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THE

advocate

Delhi

PUNJAB RECORD,



OR

Reference Book for Civil Officers.

VOLUME XXXIII.

1898.

Lahore:

THE "CIVIL AND MILITARY GAZETTE" PRESS.

1899.



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33



CIVIL JUDGMENTS,
1898.



INDEX

TO

CIVIL JUDGMENTS.

1898.

The references are to the Nos. given to the cases in the "Record."

No.

A.

Abandonment of worldly affairs.—Custom—Succession—Abandonment of worldly affairs—Gossains.—A broad distinction is to be drawn as regards the powers of inheriting property between *faqirs* or members of a religious order who have, and those who have not, entirely renounced the world, the latter class not being disqualified from succession in their natural families. In a case where it appeared that the plaintiff, though he left his village and joined a religious order (*Gossains*), had not renounced the world, but, on the contrary, was the father of three children who appeared to be grown up, *held*, that plaintiff had never reached the stage of complete asceticism which would disqualify him from inheritance, and that he was entitled to succeed to the estate of his nephew in preference to the defendant, who, if a relation at all, was a distant one 93

Abatement of Suit.—Suit for pre-emption—Death of claimant pendente lite—Muhammadan Law.—See Pre-emption, No. 12.

Acquiescence.—Suit for possession on ground that a certain sale was invalid as against plaintiff—Plea by defendant that plaintiffs acquiesced in sale—"Acquiescence"—Estoppel.—Plaintiff sued for possession of certain land and houses which had been sold in 1876 by their near collateral, one K., a childless proprietor, in favour of defendant. The defendant pleaded, and the lower Court found, acquiescence in the sale on the part of plaintiffs disentitling them to set aside the alienation, and dismissed the suit. It was proved that plaintiffs, whether or not they knew of the alienation at the time it was effected, had knowledge of it in 1878, when they gave evidence on behalf of defendant in a case in which he sued a certain tenant of his for damages for cutting a tree; that they made no mention of their rights, though present on each occasion, when the defendant twice applied, in 1880 and 1886, for partition on the strength of his deed of purchase; that they also raised no objection to his acquiring the rights of certain hereditary tenants, and that, finally, many years after the sale they took up some land from the defendant for the purpose of cultivation and tilled it almost up to the date of suit. In the last case it appeared that plaintiff, subsequently to partition proceedings, exchanged certain lands allotted to them for others which had fallen to the share of defendant, and executed certain documents, in one of which they expressly stated that they accepted the purchase by defendant in 1876, and waived all rights to object thereto. On behalf of plaintiff it was contended that

The references are to the Nos. given to the cases in the "Record."

No.

inasmuch as all the above-specified acts took place *after* the sale, plaintiffs were not thereby estopped from attacking the said transfer as they had not by any such act misled the defendant or induced him to enter into the sale transaction.

Held, that plaintiffs were precluded by their acquiescence and express words from making the present claim, and that their suit had been rightly dismissed 81

Acts :—

Act I of 1868.—See *General Clauses Act*, 1868.

Act I of 1872.—See *Evidence Act*, 1872.

Act IV of 1872.—See *Punjab Laws Act*, 1872.

Act IX of 1872.—See *Contract Act*, 1872.

Act X of 1873.—See *Oaths Act*, 1873.

Act I of 1877.—See *Specific Relief Act*, 1877.

Act III of 1877.—See *Registration Act*, 1877.

Act XV of 1877.—See *Limitation Act*, 1877.

Act I of 1879.—See *Stamp Act*, 1879.

Act IV of 1882.—See *Transfer of Property Act*, 1882.

Act XIV of 1882.—See *Civil Procedure Code*, 1882.

Act XVIII of 1884.—See *Punjab Courts Act*, 1884.

Act IX of 1887.—See *Small Cause Courts Act*, 1887.

Act XVI of 1887.—See *Punjab Tenancy Act*, 1887.

Act XVII of 1887.—See *Punjab Land Revenue Act*, 1887.

Act VII of 1889.—See *Succession Certificate Act*, 1889.

Act VIII of 1890.—See *Guardian and Wards Act*, 1890.

Act IX of 1890.—See *Railways Act*, 1890.

Act XX of 1891.—See *Punjab Municipal Act*, 1891.

Act XII of 1896.—See *Excise Act*, 1896.

Act V of 1898.—See *Criminal Procedure Code*, 1898.

"*Additional District Judge*."—See *Punjab Courts Act*, 1884, *Section 75*.

Adna and Ala Malik.—See *Custom III—Inheritance*.

Adoption.—See *Custom I—Adoption*.—*Occupancy rights, succession to—Adopted son—Punjab Tenancy Act*, 1887, *Sections 5, 59*. See *Occupancy Rights*, No. 1.

Adverse possession.—See *Limitation Act*, 1877, *2nd Schedule, Article 141*.

" " *Adverse possession—Mortgagee in possession—Adverse possession as regards mortgagee, effect of, upon rights of mortgagor*.

Held, that inasmuch as a mortgagor, who has transferred possession of the mortgaged land to the mortgagee, has no right to possession thereof until he has redeemed the mortgage, the possession of a third party, though adverse as regards the mortgagee whom he has ousted, does not, when unaccompanied by further acts of aggression upon the mortgagor's rights, give any cause of action to the latter during the

The references are to the Nos. given to the cases in the "Record."

No.

continuance of the mortgage, and that, therefore, the burden of proving that his possession was adverse as against the mortgagor no less than as against the mortgagee rests upon such third party.

I. L. R., XVIII, Bom., 51, followed.

Held, upon the facts of the case, that defendants had failed to prove that their possession was adverse as against the plaintiff-mortgagor ...

6

Adverse possession.—Limitation Act, 1877, Articles 141, 142—Adverse possession—Suit by reversioners on death of widow.—In a case in which it was proved that adverse possession had begun against a certain widow, in 1882, that the said widow died in 1883, and that her reversioners sued in 1895 for possession.

Held, that the reversioners' cause of action accrued on the death of the said widow, and that their suit, instituted within twelve years of that event, was within time.

Vundravandas v. Carsonadas, I. L. R., XXI Bom., 646, approved...

79

Agent. See *Principal and Agent.*

"Agricultural tribe."—*Sikh Khatri of Rawalpindi*—"Agricultural tribe."—See *Hindu Law—Adoption, No. 1.*

Ala and Adna Malik.—See *Custom III.—Inheritance, No. 3.*

Alienation.—See *Custom II.—Alienation.—Hindu Law—Alienation.*

Alluvion and diluvion.—Title to land acquired by accretion—Land subsequently re-transferred by amulsion—Identification of site.—Owing to changes in the course of the river Chenab, certain land, which was identified as having originally belonged to plaintiffs, after being submerged, gradually re-appeared on the Muzaffargarh side as the river receded, but was subsequently bodily transferred to the Mooltan side by a sudden change in the course of the river. While the land was on the Muzaffargarh side, the defendants brought a few detached plots under cultivation, and were still cultivating them at the time of suit. The burden of suing for possession of the said land was in consequence upon plaintiffs. The latter instituted a suit and obtained a decree in the first Court, which was, however, reversed on appeal by the Divisional Judge.

Held, in accordance with the principle laid down in *Lopez' case* (5 B. L. R., 521), that inasmuch as the site of the land in question had been duly identified as plaintiffs', the latter were entitled to succeed, and that the mere facts that they did not follow the land when it went to the Muzaffargarh side, and that the defendants had brought a few scattered plots thereof under cultivation, did not affect plaintiffs' rights as owners of the site.

I. L. R., XIX All., 238, not followed

...

...

...

36

"Ancestral property."—See *Custom II.—Alienation, No. 7.*

"Antecedent debt"—*Meaning of, in Hindu Law.*—See *Hindu Law—Alienation.*

The references are to the Nos. given to the cases in the "Record."

No.

Appeal in Civil cases.—Res judicata—Cross-suits relating to same subject-matter and involving identical issues tried together—Finding on issues in both judgments identical—Appeal from judgment in one case only.—See *Civil Procedure Code, 1882, Section 13.*

" " " *Civil Procedure Code, 1882, Section 136*—"Decree"—Appeal.—See *Civil Procedure Code, Section 136.*

" " " *Civil Procedure Code, 1882, Sections 231, 244*—Application for execution of whole decree by one of several joint decree-holders—Dismissal of application—Appeal.—See *Civil Procedure Code, 1882, Section 231.*

" " " *Civil Procedure Code, 1882, Section 562*—Erroneous orders of remand—Powers and duties of Chief Court when hearing appeal from such order.—See *Civil Procedure Code, 1882, Section 562.*

" " " *Order of Appellate Court returning plaint*—Appeal.—See *Civil Procedure Code, 1882, Section 588 (6).*

" " " *Civil Procedure Code, 1882, Sections 375, 622*—Offer made by defendant pendente lite to settle case—Compromise—Decree based on plaintiff's acceptance of offer repudiated by defendant—Appeal—Revision.—See *Civil Procedure Code, 1882, Section 622.*

" " " *Omission by guardian ad litem to appeal on behalf of minor against decree*—Gross negligence on part of guardian—Res judicata.—See *Guardian and Ward.*

" " " *Land-Suit*—Right in tank used for watering cattle and excavating earth for bricks—Appeal.—See *Land-suit.*

" " " *Pre-emption*—Conditional decree—Payment of purchase money—Appeal—Decree of Appellate Court confirming decree of first Court, but silent as to time for payment of purchase money.—See *Pre-emption, No. 10.*

" " " *Appeal and cross-objections*—Power of appellant to defeat cross-objections by withdrawing from appeal—Case remanded to lower Appellate Court under Section 562, *Civil Procedure Code*—Default of appellant—Proper order for lower Appellate Court to pass.—The first Court having decreed plaintiffs' suit for pre-emption at Rs. 492, plaintiff appealed to the Divisional Court as to the price, and defendant cross-objected that plaintiff's suit had not been filed by a duly qualified agent. The Divisional Court dismissed the suit on the latter ground, whereupon plaintiffs appealed to the Chief Court, which remanded the case to the lower Appellate Court, under Section 562 of the *Civil Procedure Code*, for decision as to whether plaintiffs' alleged agent had been duly authorised to institute the suit, and for disposal of the appeal if the suit were found to be within limitation. At the date fixed for hearing on the remand, plaintiff failed to appear, whereupon the lower Appellate Court passed an order to the effect that the appeal must be dismissed for plaintiff's default, and that, therefore, defendant's cross-objection failed, and could not be entertained.

INDEX TO CIVIL JUDGMENTS.

The references are to the Nos. given to the cases in the "Record."

No.

Held, that inasmuch as the case had been remanded by the Chief Court merely in order to give plaintiff an opportunity of proving that his alleged agent was duly authorized to institute the suit, the lower Appellate Court should have held, on plaintiff's default, that the previous order of the Divisional Court stood.

Held, further, that when once an appeal has come to a hearing, the Court is seised of the appeal, and an appellant cannot in such a case defeat a cross-objection by withdrawing from the appeal... 86

Appellate Court.—*Plea raised in Appellate Court for first time—Question of law.*—*See Occupancy Rights, No. 1.*

Arbitration.—*Power of Court to inquire into objection denying validity of a reference to arbitration—Civil Procedure Code, 1882, Sections 520, 521, 522, 523, 525, 622.*—*See Civil Procedure Code, 1882, Section 525.*

„ *Suit to set aside award of arbitrators appointed by Revenue Officer in partition proceedings—Allegation of fraud, but no dispute as to title.*—*See Partition, No. 2.*

Arrest.—*Civil Procedure Code, 1882, Sections 336, 337 A—Arrest and imprisonment in execution of decree—Subsequent application stating judgment-debtor's intention to apply to be declared insolvent—Rejection of application—Illegal confinement—Duress.*—*See Civil Procedure Code, 1882, Section 336.*

Attachment in execution of decree.—*See Civil Procedure Code, 1882, Section 274.*

Attornment.—*See Landlord and Tenant, No. 1.*

Award.—*See References under Arbitration.*

B.

Benami Transaction.—*Plaintiff in pre-emption suit acting benami.*—*See Pre-emption, No. 5.*

Burden of proof.—*Custom—Adoption of daughter's son—Jhumman Jats of Sialkot District—Perversion of next collaterals to Muhammadanism.*—*See Custom I.—Adoption, No. 2.*

„ *Adoption of brother-in-law's son—Hindu law or custom—Sikh Khatri of Rawalpindi District—"Agricultural tribe".*—*Burden of proof.*—*See Hindu Law—Adoption, No. 1.*

„ *Adoption of daughter's son—Banias of Jagraon—Burden of proof.*—*See Hindu Law—Adoption, No. 2.*

„ *Promissory Note—Consideration—Inequitable bargain.*—*See Promissory Note.*

„ *Punjab Courts Act, 1884, Section 40 (i), (ii)—"Point of law involved"—Question as to burden of proof—Separation deed between husband and wife—Allegations of misconduct on part of wife—Revision—Civil Procedure Code, Section 622.*—*The Divisional Judge granted a certificate of appeal, under Section 40 of the Punjab Courts Act, to the effect that "a question of law is involved, namely, whether a child "born in the lifetime of its father is not presumed to be a legitimate*

The references are to the Nos. given to the cases in the "Record."

No.

"one, and whether the *onus probandi* was not on the defendant-appellant to prove the unchastity of his wife, and whether it is not a "question of 'no proof' about the finding of unchastity of the plaintiff-respondent, and that the case is, in my opinion, of sufficient importance to justify a further appeal."

Held, that the certificate on the question of *onus probandi* and the mode of decision was not one contemplated in the Act, and was bad.

Seemle : The right construction of the word "involved" is that it applies to the case rather than to the appeal which is to be certified under sub-section (i) (d), or admitted under sub-section (ii) of Section 40 of the Act, and includes points which may be raised by way of defence in an appeal.

But *held*, that the Divisional Judge had acted with material irregularity, within the meaning of Section 622 of the Civil Procedure Code, inasmuch as (1) he had started a new ground of defence not pleaded by the defendant, *viz.*, that the agreement for separation between the defendant and his wife (the plaintiff) was obtained under pressure, and should not be enforced; (2) he had absolved the defendant from liability, although finding that defendant had committed a breach of the agreement from the beginning; (3) he had wrongly decided the question of *onus* of proof as regards breach of the terms of the agreement, and (4) he had dealt in generalities and conjectures about plaintiff's general bad conduct instead of giving definite finding on the evidence as regards specific misbehaviour on her part.

Although Hindu Law does not recognize divorce, the marriage tie being indissoluble, yet where the finding of a Court, in a suit by the wife for maintenance, would put an end to the plaintiff's conjugal rights, make her an outcast, and probably drive her into the streets for her livelihood, the evidence as to adultery and immorality on her part should be of a definite character as well as cogent and reliable, before the Court acts upon it for the purpose of dismissing her suit.

Section 622 of the Civil Procedure Code lays down the conditions under which the Court may revise the proceedings of subordinate Courts, and its powers of interference is subject to these conditions. But once the jurisdiction to revise is established on any of the grounds specified in the first part of the said section, there is no limitation imposed on the power of the Court as to the mode of disposal. The section is intended to arm the Court with the power of remedying injustice in cases not subject to appeal under certain specified circumstances, and, therefore, when the grounds of jurisdiction are established and a fit case shown for the exercise of its powers, there is nothing in the section to preclude the Court from finally disposing of the case itself because points of fact, and not points of law, are involved.

The Court finding that defendant had entirely failed to prove breach of the conditions of the agreement between him and plaintiff on the part of plaintiff, or that the latter had been guilty of any immorality, set aside the order of the Divisional Court, and restored the decree which plaintiff had obtained in the first Court

41

Burden of proof.—Punjab Courts Act, 1884, Section 40—Questions of law involved—Burden of proof—Construction of deed—Contradictory finding by lower Appellate Court—Material irregularity.

The references are to the Nos. given to the cases in the "Record."

No.

Held, that the proper allocation of the burden of proof and the construction of a deed which merely affected the parties to the suit and concerned no one else, were not "questions of law involved in the case" within the meaning of Section 40, of the Punjab Courts Act, 1884.

No. 45, *Punjab Record*, 1894, and No. 68, *Punjab Record*, 1897, followed.

It was further contended, on behalf of appellant, that inasmuch as the Divisional Judge had held that Article 127 of the Limitation Act was applicable to the case, his subsequent finding that the property in dispute was not "joint family property" amounted to an error of law or at least to a material irregularity within the meaning of Section 622 of the Civil Procedure Code.

Held that, even upon the assumption that such findings were erroneous and contradictory, they would not amount to "questions of law involved" within the said section of the Punjab Courts Act.

Held, further, that all that was decided by the Divisional Judge was that if the allegations in the plaint were correct and the property were to be held to be "joint family property," then under these conditions Article 127 of the Limitation Act would be applicable, and that this did not amount to holding that the property was in fact "joint family property," so as to throw the burden of proving that it was not on the other side, or preclude the Court from finding on the merits that it was not in fact "joint family property."

It not being contended that the parties were members of a joint Hindu family, and it being admitted that all the house property other than that in dispute had been partitioned, though some property consisting of agricultural land was still held jointly, *held*, that the burden of proving that the property in dispute was joint family property was at the outset rightly placed on plaintiffs, and that there was nothing in the findings of the Divisional Judge as above explained which shifted the burden to the other side.

Held, therefore, that the Divisional Judge had not acted with material irregularity in dismissing plaintiffs' claim on the ground that they had failed to discharge the *onus* which rested on them

66

C.

Cause of Action.—See *Custom II.—Alienation*, Nos. 3, 4, 6 and 8—*Occupancy Rights*, Nos. 2 and 3.

" " " *Civil Procedure Code*, 1882, Sections 19, 43, 45—*Suit for possession of immovable property situate in different districts—Joint suit by reversioners against person in wrongful possession—Misjoinder of causes of action*—"Cause of action," meaning of.

Held, that under Section 19 of the Civil Procedure Code, when immovable properties are situate in several districts, a suit in respect of the whole of the properties can be brought in any one of these districts.

I. L. R., XIV *Calc.*, 661, followed.

The references are to the Nos. given to the cases in the "Record."

No.

Where on the death of the survivor of two widows, all the reversioners, fourteen in number, brought a joint suit for possession of property which was alleged to be wrongfully withheld from them by the defendant, and which was admittedly undivided.

Held, that though the rights of the plaintiffs might be divisible and have accrued to them undivided on the death of the said widow, the substance to which those rights attached being undivided, plaintiffs' title and property was still joint, and that they were therefore entitled to jointly sue defendant whose wrongful holding of possession of the property was the single act which infringed those rights.

Held, further, that even if the words "cause of action" were construed in the limited sense of including merely the facts constituting the infringement of the right, but not those constituting the right itself, the plaintiffs were nevertheless entitled to sue jointly, as it was the same wrongful act of the defendant which infringed these rights, whether joint or distinct in the property in dispute.

It appeared that during the lifetime of the widows the reversioners had brought several suits for declaratory decrees in respect of various alienations effected by the said widows in favour of the present defendant from time to time, but that they had not sued for certain houses which were now included in their claim.

Held, that inasmuch as the reversioner's right to possession of the houses could not accrue during the ¹⁰time of the widows, their suit for possession thereof on the death of the survivor of the widows, was not barred under Section 43 of the Civil Procedure Code ...

91

Certificate Succession Act, 1889.—See *Joinder of Parties*, No. 2.

Chaddar Andazi—Proof of Marriage by.—See *Custom III.—Inheritance*, No. 4.

Chundavand or Pagvaud.—See *Custom III.—Inheritance*, No. 7.

Civil Procedure Code, 1882, *Section 13*.—See *Res Judicata*.

" " " " *Section 13.—Res judicata—Cross suits relating to same subject-matter and involving identical issues tried together—Findings on issues in both judgments identical—Appeal from judgment in one case only—Civil Procedure Code*, 1882, *Section 13*.—Where two cross-suits, relating to the same subject-matter and giving rise to identical issues are tried by the same Court, and it cannot be urged that there is a bar to the trial of the issues by the Court in either case, an Appellate Court is not precluded from adjudicating on those issues, if one judgment is appealed and the other is not, by the operation of the latter judgment under the rule of *res judicata*, though the findings on the issues in both judgments are identical.

I. L. R., XVI *Col.*, 233, followed; *I. L. R.*, VI *Cal.*, 319, not followed; *I. L. R.*, XI *All.*, 148, distinguished.

A decision on a point, which is decided, but which is not necessary for the decision of the suit, which is disposed of on another point, cannot operate as *res judicata*.

Where a plaintiff brought her own suit, in which the question of her right necessarily and directly arose, *held*, that she could not

The references are to the Nos. given to the cases in the "Record."

	No.
be held to have acquiesced in the same issue being treated as a material one in another suit, in the same Court, in which she was impleaded only as a member of the family, the two suits being tried together	31
<i>Civil Procedure Code, 1882.—Section 13.—Res judicata—House and land sold by one deed of sale—Suit in respect of house—Subsequent suit in respect of land—Finding in first suit that deed of sale was void, effect of, as regards subsequent suit.—A. had a decree against B., and in execution thereof attached a house belonging to B., whereupon C. objected that B. had conveyed the house to him by a deed of sale which covered the house in dispute, and also a building site. The objection was disallowed, and C. was referred to a suit which he brought, and in which it was held that the sale by B. to C. was fictitious and in fraud of creditors, and was therefore invalid. Subsequently A. attached the building site, and C. again objected on the same ground as before. The objections having been again disallowed, C. filed the present suit to establish his right to the building site. The question referred to the Full Bench was whether the decision in the first suit as to the validity of the sale was binding on the parties in the second suit.</i>	
<i>Held, by the Full Bench, that though the subject-matter of the second suit was different, in the sense that in the one suit a plot of land and in the other a house was claimed, yet the material issue, whether the sale-deed conveyed a title or was fictitious and fraudulent, was identical in both suits, and that, therefore, the finding thereon in the first suit operated as res judicata, and precluded the issue which it had decided being raised again between the same parties in a subsequent suit, the latter suit being within the jurisdiction of the Court which decided the prior suit</i>	100
" " " " <i>Section 19.—Suit for possession of immovable property situate in different districts—See Cause of Action.</i>	
" " " " <i>Section 43.—Suit for possession of immovable property situate in different districts—Joint suit by reversioners against person in wrongful possession—Misjoinder of causes of action—"Cause of action."—See Cause of Action.</i>	
" " " " <i>Section 43.—Civil Procedure Code, 1882, Section 43—Application to Revenue Officer for partition of land—Question of title decided by said officer—Subsequent suit for possession of house—Title to land and house identical—Punjab Land Revenue Act, 1887, Section 117.—In previous partition proceedings, relating to certain land and between the parties to the present suit, the Revenue Officer, before whom the proceedings were instituted, passed an order under Section 117 of the Land Revenue Act, to the effect that he would himself inquire into and determine the question of title that had been raised. Subsequently the present plaintiffs filed an application, upon which they paid the full stamp necessary for a civil suit, but which was not in the form of, or verified as, a plaint, and contained no statement of claim beyond a reference to the said order, and a statement that a separate suit would be brought for possession of a house connected with the land. The application was, however,</i>	

INDEX TO CIVIL JUDGMENTS.

The references are to the Nos. given to the cases in the "Record."

No.

registered in the register of civil suits, the order that it should be so registered and the summons issued being signed by the said officer, who was an Extra Assistant Commissioner, as "Munsif, 1st class." The officer then proceeded under Section 117 (2) (b) of the Land Revenue Act, and gave plaintiff a decree in respect of the land, the judgment being signed by him as "Assistant Collector," and the decree as "Munsif, 1st class." Plaintiffs having subsequently sued for possession of the house mentioned in their said application, defendants pleaded that the suit was barred under Section 43 of the Civil Procedure Code, on the ground that the decree in the partition proceedings had been passed by the Extra Assistant Commissioner, purely in the exercise of his civil powers as a Munsif, 1st class, and that therefore the claim to the house could have been made before him and determined in those proceedings. It was admitted that plaintiffs' title to the land and to the house was the same.

Held, that the Extra Assistant Commissioner had clearly intended in the partition proceedings to act under Section 117 (2) (b) of the Land Revenue Act, as a Revenue Officer, and that his jurisdiction was confined to the question of title to the land which alone was the subject of those proceedings.

Held, therefore, that inasmuch as no claim to the house could have been included in the former proceedings, the present suit was not barred under Section 43 of the Civil Procedure Code 30

Civil Procedure Code, 1882, Section 45.—See *Cause of Action*.

" " " " Section 53.—*Appeal from order of Appellate Court returning plaint for amendment or for presentation to proper Court*.—See *Civil Procedure Code*, 1882, Section 588 (6).

" " " " Section 108.—*Civil Procedure Code*, 1882, Section 108—*Money paid into Court*—*Ex-parte decree upheld*—*Application by decree-holder for payment of deposit*—*Execution of decree*—*Limitation Act*, 1877, 2nd Schedule, Article 179.—When a sum of money is paid into Court under Section 108, Civil Procedure Code, in order to be delivered to plaintiffs, should the *ex-parte* decree be upheld, such sum becomes the decree-holder's money as soon as the *ex-parte* decree is upheld, and it is not necessary for him to apply for execution of the decree in order to obtain payment of the money.

Where, therefore, in such a case the decree-holder applied for payment of the deposit more than three years after the decree was passed

Held, that such application could not be considered an application for execution of decree, and was not barred under Article 179 of the 2nd Schedule to the Limitation Act 8

" " " " Section 111.—*Partnership—Lien—Contract Act*, 1872, Sections 60, 61, 217, 262—*Set-off*—*Civil Procedure Code*, 1882, Section 111.—The rule as to the equitable lien possessed by each partner on the partnership property cannot be applied so as to enable a managing partner to appropriate money due to another partner out of the assets of a firm in liquidation of a debt due from that partner to himself and entirely unconnected with the business of the firm.

The references are to the Nos. given to the cases in the "Record."

No.

Neither at common law nor in equity is there any right of set-off between parties mutually indebted in the absence of an agreement to that effect. Nor do the provisions of Section 111 of the Civil Procedure Code apply where the debt sought to be set-off was barred by limitation before the suit was filed

53

Civil Procedure Code, 1882, Section 130.—Civil Procedure Code, 1882, Sections 130, 136, 138, 139.—Failure to comply with order directing defendant to produce documents by specified date—Defence struck out and case heard ex-parte.—Plaintiff's plaint was filed in the District Court on the 23rd December 1895, and the 9th February 1896 was fixed for defendant's appearance. The latter appeared on the said date, but the case was put off to the 24th February, on which date defendant filed his defence. After several adjournments, issues were drawn and the parties examined on the 2nd April, and at the close of the day's proceeding the District Judge recorded an order to the following effect: "Case for evidence on the 19th and 20th May. "Defendant must file the documents he has in his possession and "copy of his account-book by 5th April." On all the adjourned dates, except one, defendant was present in person in Court.

On the 2nd April plaintiff had a notice served on defendant for the production of his books and certain letters, and on the 9th April defendant gave plaintiff notice under Section 132 of the Civil Procedure Code, offering inspection at a certain place on the 19th. On the 21st April, after inspection by the plaintiff, defendant applied for leave to remove his books to his shop, and on the following day the District Judge gave the required permission. Plaintiff called defendant as his witness for the 19th May, but the notice was returned unserved with the endorsement that defendant had gone away. Thereupon plaintiff's pleader complained that defendant had kept out of the way to evade service, and had not complied with the order of the 2nd April. The Court was, therefore, asked to proceed under Section 136 of the Code, by striking out defendant's defence, and to decide the case *ex-parte*. The Court held that the said order was one under Section 130 of the Code, struck out the defence under Section 136, and after taking some evidence for the plaintiff, decreed the claim in full. The decree having been upheld by the Divisional Court on appeal, defendant appealed to the Chief Court.

Held, that the lower Courts had erred in treating the order of the 2nd April as one passed under Section 130 of the Code, and that the District Court was not justified by defendant's non-compliance with the said order in striking out the defence and deciding the case *ex-parte*.

Section 130 of the Code does not apply to a general direction, without any particular object in view, to a party to produce all documents in his possession by a certain date, and (*semble*) the order therein referred to is meant to be served on the party to whom it is given, and not merely to be verbally announced, so that compliance would depend on his memory or his understanding of it.

Held, further, that even if the order in question had been one under Section 130, it could not be legally given in respect of the copy of de-

The references are to the Nos. given to the cases in the "Record."

No.

defendant's accounts as they were not in existence, and therefore not in the possession or power of defendant, when it was passed.

Section 136 of the Code requires to be worked with caution and should be made use of only as a last resort, and it is always proper to make the order a conditional one, and to grant a little further time for compliance 58

Civil Procedure Code, 1882—Section 136.—See Section 130, supra.

" " " " *Section 136—"Decree"—Appeal.—An order under Section 136 of the Civil Procedure Code, dismissing a suit, is a decree from which an appeal lies 43*

" " " " *Sections 138, 139.—See Section 130, supra.*

" " " " *Section 230.—Execution of decree—Limitation—Civil Procedure Code, 1882, Sections 230, 235—Limitation Act, 1877, 2nd Schedule, Article 179 (iv).—The decree of which execution was sought, was passed on the 15th July 1880, and an application for execution by attachment and sale of movable property was made on the 27th October 1882, but as no movable property could be found, the proceedings were infructuous and terminated. Subsequently, on the 18th October 1883, on a fresh application for execution, the judgment-debtor was arrested and imprisoned, and a small sum of money was realised by sale of a document. On the 29th January 1884 an application was made for execution by attachment and sale of immovable property of the judgment-debtor. The executing Court dealt with this application as one for a farm of the property, but the error was amended by the Divisional Court on appeal, and proceedings were protracted until, on the 31st October 1891, the Commissioner of the Division refused to sanction sale of the property. On the 31st October 1892 the decree-holder filed an application, setting forth the refusal of the Commissioner to sanction the said sale and his own fruitless endeavours to realise his decree, and praying that the land be sold or a receiver appointed under Section 503 of the Civil Procedure Code. An order for the appointment of a receiver having been made, the judgment-debtor appealed to the Chief Court, and it was contended on his behalf that execution of the decree was barred under the provisions of Section 230 of the Code, and Article 179 (iv) of the 2nd Schedule to the Limitation Act, 1877. It was urged that the application of 1892 was "a subsequent application" within the meaning of the said section of the Code.*

Held, that the said application was merely a petition to the Court, seised of, and already executing, the decree on the application of 1884, to take a step in aid of the execution on that application, and was, therefore, not barred under Section 230 of the Code, which does not apply to applications or petitions asking the Court to give effect to previous petitions still pending.

Held, further, that inasmuch as proceedings in execution had been pending ever since 1884, execution was not barred by reason of "steps in aid of execution" not having been taken every three years ... 40

" " " " *Section 231.—Civil Procedure Code, 1882, Sections 231, 244.—Application for execution of whole decree by one of several joint decree-holders—Dismissal of application—Appeal.—An application for execu-*

The references are to the Nos. given to the cases in the "Record."

No.

tion of the whole decree was made, under Section 231 of the Civil Procedure Code, by one of four joint decree-holders, but was dismissed by the District Judge on the ground that the decree could not be executed until all the decree-holders joined in the application. It appeared that the judgment-debtor was not summoned to defend the application, but on appeal from the District Judge's order he was impleaded as well as the other co-decree-holders. The Divisional Judge ordered that the execution should proceed on the applicant joining with him such of his co-sharers as were willing to execute the decree jointly with him, and impleading the rest who objected and declined to take out execution, and that the Court should take possession of the entire land decreed, and separate off the shares of the applicants from those of the others through the agency of the Collector. The judgment-debtor appealed to the Chief Court, and it was contended on his behalf that the order of the District Judge under Section 231 of the Code was not appealable, and that, therefore, the order of the Divisional Judge was without jurisdiction and void.

Held, following *J. L. R., XVII Mad.*, 394, that the Divisional Judge had jurisdiction to hear the appeal.

Although, if an application under Section 231 of the Code is dismissed without summoning the judgment-debtor or issuing process, and the latter is not made a party to the appeal, the question may be one beyond the province of the Appellate Court to adjudicate upon, yet if, as in the present case, the judgment-debtor is impleaded on the appeal, the question then becomes one under Section 244 of the Code, and an appeal lies.

The Court refused, under the circumstances of the case, to interfere with the order of the Divisional Judge on the merits

28

Civil Procedure Code, 1882, Section 235.—See Section 230, supra.

" " " " *Section 244.—See Section 231, supra.*

" " " " *Section 244—Decree for pre-emption—Question whether decree-holder has paid money into Court within time.—On the 19th May 1897, Hyat obtained a decree against Saghar Mal, vendee, for pre-emption of certain land, and it was ordered that on payment by him of Rs. 2,000, purchase-money, by the 28th June 1897, for payment to Saghar Mal, vendee, together with Rs. 29, cost of sale-deed and registration, he should be put in possession of the land, and that, in default of deposit of the said sums, the decree should become void. The decree holder, by mistake, paid into Court only Rs. 2,000, by the 28th June, and on the 1st July the vendee submitted an application urging that the decree had become void in consequence of the failure of the decree-holder to pay in the whole amount specified in the decree. This application having been rejected, the judgment-debtor (vendee) appealed to the Divisional Judge, but his appeal was dismissed on the ground that no appeal lay.*

Held, that the question whether the purchase-money had been deposited in time was one arising between the parties to the suit, in which the decree was passed, and relating to the execution thereof, within the meaning of Section 244 of the Civil Procedure Code.

Held, therefore, that an appeal lay to the Divisional Judge from the order rejecting the application

38

The references are to the Nos. given to the cases in the "Record."

No.

Civil Procedure Code, 1882, Section 263.—Sale of residential house by one of four Hindu co-sharers—House occupied by tenant—Right of vendee to joint physical possession—Civil Procedure Code, 1882, Section 263.—Appellant purchased from one of four Hindu brothers his share, being one-fourth of a dwelling-house, in the Civil Lines, Rawalpindi, which had for some years previously been rented, for residential purposes, by the Political Officer for the time being with *Sardar Ayub Khan*. It appeared that the appellant wished to occupy the whole house, and purchased the share of his vendor, but was unable to come to terms with the three other co-sharers. The respondent, tenant of the house, originally from all the four co-sharers, and finally from three of them, having refused to vacate any part of it, appellant filed a suit against him and his three lessors for "joint possession of one-fourth share of the said house, Rs. 260 arrears of rent and costs," and on the 19th November 1897 obtained a decree against respondent "for possession of a joint quarter share, and for Rs. 60 rent and for costs." Subsequently appellant applied for execution of the said decree, and prayed that "possession of a one-fourth share of a house situate in the Civil Lines, in which the judgment-debtor lives, be given." This application having been dismissed on the ground that an order for physical possession, if passed, could not be carried out, having regard to the fact that the respondent was in possession as tenant of a majority of the co-sharers, the decree-holder appealed to the Chief Court.

Held, that appellant having confined his application to physical possession of the house in suit, and having refused to accept possession through receipt of rent, the application had been rightly rejected, on the ground that the house having been enjoyed by the co-sharers only through receipt of rent, it was not open to one co-sharer to transfer to his vendee the right to interfere with the rights of the other co-sharers in such a manner as to deprive them of the enjoyment of their shares in the joint property

16

" " " *Section 274.—Civil Procedure Code, 1882, Sections 274, 276*—*Validity of attachment.*—On the 8th October 1888, the decree-holder applied for execution of his decree by attachment and sale of the whole of the judgment-debtor's immovable property, and the report of the attaching officer was that attachment had been effected on the 22nd October 1888 by beat of drum on the spot and by affixing a notice, under Section 274 of the Civil Procedure Code, on the house of the judgment-debtor, situate on the spot. It did not, however, appear from the report that a copy of the notice was affixed in the Court-house or in the office of the Collector of the District, and no evidence was adduced on this point. The plaintiff purchased the land in dispute from the said judgment-debtor on the 18th March 1891, and it was contended on his behalf that, in order to render the sale to him invalid, the decree-holder was bound to prove that all the conditions of Section 274 had been duly complied with. It was proved that there had been litigation about the attachment before plaintiff's purchase, and that the latter's sale-deed was executed at Lahore, and not at Amritsar, where it would ordinarily have been executed.

The references are to the Nos. given to the cases in the "Record."

No.

Held, having regard to the circumstances of the case, that plaintiff had notice *aliunde* of the attachment, and that there was no reason to hold that the condition of Section 274 had not been complied with, or, in any case, that the attachment was not valid as against plaintiff.

The rule laid down in *I. B. L. R.*, (S. N.), 20 and *I. L. R.*, II All., 58, should not be strictly applied in this Province

83

Civil Procedure Code, 1882, Section 276—See Section 274, *supra*.

Section 336.—*Civil Procedure Code*, 1882, Sections 336, 387 A—Arrest and imprisonment in execution of decree—Subsequent application stating judgment-debtor's intention to apply to be declared an insolvent—Rejection of application—Illegal confinement—Duress.—Where a debtor, on being arrested and brought before a Court in execution of a decree, expresses his intention to apply to be declared an insolvent, under Section 336 of the *Civil Procedure Code*, the Court must release him on his furnishing security to appear when called upon, and to apply within one month under Section 344 of the *Code*.

Where, however, the debtor did not apply under Section 336 on being first brought before the Court, but made such application after proceedings under Section 337 A had terminated, and it did not appear that he had furnished the requisite security.

Held, that, without holding that an application under Section 336 cannot under any circumstances be made after proceedings under Section 337 A, the Court in the present case was not bound to release the petitioner, and that his confinement in jail was not illegal by reason of such application.

Held, therefore, that a mortgage and bond executed by such debtor while in jail for the purpose of securing his release were not void on the ground of duress

5

Section 337 A.—See Section 336, *supra*.

Section 365.—Death of sole plaintiff after conclusion of case, but before delivery of judgment—Decree drawn up in favour of deceased plaintiff—Material irregularity—*Civil Procedure Code*, 1882, Sections 365, 366.—In a certain case after evidence had been taken and arguments heard on the 28th and 29th September 1897, the District Judge on the 2nd November 1897 gave the (sole) plaintiff a decree for the property claimed, and at the foot of his judgment recorded the following note:—

"It having been brought to my knowledge that plaintiff has died in the *interim*, I deliver judgment notwithstanding, being guided by *I. L. R.*, XXI Bom., 314. and the authorities quoted therein, defendant's counsel agreeing." Defendant applied to the Chief Court on the Revision Side to set aside the said decree.

Held, that under the circumstances of the present case, there had been a disregard of the provisions of the *Civil Procedure Code* which had materially prejudiced the defendant, inasmuch as she could not appeal against a dead person, and had no right of appeal against

The references are to the Nos. given to the cases in the "Record."

No.

his heirs who were not on the record, and was, moreover, deprived of the possibility of the suit being allowed to abate in consequence of no application under Section 365, Civil Procedure Code, being made within the time allowed by law.

Held, therefore, that the decree of the District Court must be set aside and the case remanded for disposal in accordance with law with reference to Sections 365 and 366 of the Code.

ROE, C. J. — A decree passed in favour of, or against, a dead person is not *ipso facto* a nullity, and all that can be said in such a case is that there has been a disregard of the provisions of the Civil Procedure Code. Each case must be decided on its merits, and the decree should be set aside or maintained, as if the death occurred after decree, according as the disregard of procedure has or has not materially prejudiced the parties.

I. L. R., XXI Bom., 314; *I. L. R.*, VI Mad., 180; *J. L. R.*, XV Mad., 399; *I. L. R.*, XVII All., 478; No. 31, *Punjab Record*, 1886; No. 7, *Punjab Record*, 1889; and No. 78, *Punjab Record*, 1891, referred to. ...

20

Civil Procedure Code 1882, Section 366.—See Section 365, *supra*.

"

Section 375.—*Appeal—Civil Procedure Code, 1882, Sections 375, 622—Offer made by defendant pendente lite to settle case—“Compromise”*—Decree based on plaintiff's acceptance of offer—Offer repudiated by defendant—Power of pleader to compromise suit—Plaintiff's suit, which was filed on 7th May 1895, was in respect of one-third of the estate of one F. J., deceased, which plaintiff claimed as F. J.'s sister. On the 18th June the pleas of a co-defendant, who had taken part of the disputed property in mortgage from the real defendant, Mussammatt W.B., deceased's widow, were filed, and the latter's advocate applied for, and obtained, an adjournment in order that a compromise might be come to. After another adjournment the case was fixed for the 15th October, on which date Mussammatt W. B. was represented by a pleader who stated his oral pleas on her behalf and concluded with the words "If plaintiff is still willing to receive Rs. 2,000 in satisfaction of all claims, defendant No. 1 is willing to pay. If not she cannot recognize any claim of the plaintiff."

Thereupon the parties appear to have applied for a further postponement in order that the case might be settled out of Court, and the 23rd October was fixed for the next hearing. On that date nothing was said on either side about any compromise or defendant's offer, but defendant's pleader got additional pleas on the merits recorded. The case was then adjourned (for no special reason) to the following day, when plaintiff's recognized agent, acting on a fresh power-of-attorney, dated the day before, and in supersession of a previous power in his favour, stated that plaintiff was willing to take Rs. 2,500 in full satisfaction of her claim and to forego costs. Defendant's pleader (who was other than the pleader through whom the offer of the 15th October had been made) replied that he had that day been instructed to say that his client did not agree to pay Rs. 2,500, and that if the Court gave a decree, it must be against the estate. To this plaintiff's pleader objected. The Court held that the offer of 15th October was

The references are to the Nos. given to the cases in the "Record."

No.

subject to no such qualification, and gave a decree in plaintiff's favour for Rs. 2,500 on "the pleadings as they stand." This decree was at first modified by the Divisional Judge, on appeal, but was subsequently restored by him on review. Defendant appealed to the Chief Court, and it was objected, on plaintiff's behalf, that the decree fell within the purview of Section 375 of the Civil Procedure Code, and was therefore final.

Held, that, whether or not the decree in the present case fell under the said section, the procedure of the District Judge was sufficiently tainted with material irregularities to justify interference under Section 622 of the Code.

Semle: Under the circumstances of the case an appeal was competent.

Held, that the material irregularities committed by the District Judge were (i) in stating that his decree was based on the pleadings when in fact the said decree was not made with reference to any material allegation of fact or proposition of law relating to the subject-matter of the suit made or affirmed by one side and admitted by the other; (ii) even assuming that the Court had power to pass such a decree, in not enquiring, as it was bound to do, into the objections of defendant, whose pleaders should have been asked whether repudiation meant that the original offer had not been made with authority or merely that it was withdrawn and the acceptance too late; (iii) in not making any inquiry as to whether defendant's pleader had express authority to make the offer of the 15th October; (iv) in assuming that the said offer was still binding on the 24th October, and in proceeding to pass a decree in accordance with its terms without further inquiry.

Held, therefore, that the decrees of the lower Courts must be set aside.

A pleader has not power without express authority from his client to bind him by a compromise 50

Civil Procedure Code, 1882, Sections 520, 521, 522, 523, 525.—Civil Procedure Code, 1882, Sections 520, 521, 522, 523, 525, 622—Power of Court to inquire into objection denying validity of a reference to arbitration—Revision—Practice.

Held, by the Full Bench, that it is not competent to a Court, upon an application, under Section 525 of the Civil Procedure Code, to file an award, to inquire into and decide objections other than those specified in Sections 520 and 521 of the Code.

It is not the invariable, though it is the usual, practice for a High Court to refuse to interfere, under Section 622 of the Code, when the party professing to be injured has another remedy open to him.

No. 134, *Punjab Record*, 1888, and No. 49, *Punjab Record*, 1893, overruled 21

" " " " *Section 562.—Oaths Act, 1873, Section 11—Evidence given by person on oath, effect of, as regards person offering to be bound*

The references are to the Nos. given to the cases in the "Record."

No.

thereby—*Civil Procedure Code, 1882, Section 562.*—Under Section 11 of the Oaths Act, 1873, the evidence given by a person on oath is, as regards the party who offered to be bound thereby, conclusive proof merely of the matter stated and of nothing further.

Where, therefore, in a suit by plaintiff for Rs. 550 profits lost by plaintiff through the default of N. C. and another, defendants, to deliver gram during one month at contract rate, and for Rs. 80 earnest-money paid to N. C., it appeared that one D. D., defendant, who made the contract as a broker and was alleged to have been a surety for its due performance, challenged N. C. to the oath, saying that if N. C. would swear that he (N. C.) had not received the earnest-money, he himself would be responsible for the plaintiff's claim, and the said N. C. thereupon swore that he had not received the said earnest-money, *held*, that such statement, on oath, merely concluded the question whether N. C. had or had not received such earnest-money.

Held, therefore, that the first Court had erred in regarding the oath so taken as *per se* sufficient ground for decreeing the suit as against D. D. and dismissing it as against the other defendants.

Held, further, that inasmuch as the first Court had decreed the suit merely on the oath taken, and had not decided any of the five issues which it had framed, the lower Appellate Court had rightly remanded the case under Section 562 of the Civil Procedure Code

45

Civil Procedure Code, 1882, Section 562.—*Order of remand under Section 562, Civil Procedure Code, 1882—Erroneous order—Powers and duties of Chief Court when hearing appeal from such order.*

Held, that when a certain fact is the basis of a suit and there is no suggestion that the inquiry into that fact by the first Court has been insufficient or imperfect, and the lower Appellate Court, differing from the Court of first instance as to the existence of that fact, has remanded the suit under Section 562 of the Code of Civil Procedure, the Chief Court, when hearing an appeal from the order of remand, is entitled, when it finds that the order of remand should not have been made under that section, to itself consider and decide upon the truth of such fact, and is not bound to return the appeal to the lower Appellate Court for decision thereon

56

" " " *Section 562.*—*Appeal and cross-objections—Power of appellant to defeat cross objections by withdrawing from appeal—Case remanded to lower Appellate Court under Section 562, Civil Procedure Code—Default of appellant—Proper order for lower Appellate Court to pass.*—The first Court having decreed plaintiff's suit for pre-emption at Rs. 492, plaintiff appealed to the Divisional Court as to the price, and defendant cross-objected that plaintiff's suit had not been filed by a duly qualified agent. The Divisional Court dismissed the suit on the latter ground, whereupon plaintiff appealed to the Chief Court, which remanded the case to the lower Appellate Court, under Section 562 of the Civil Procedure Code, for decision as to whether plaintiff's alleged agent had been duly authorised to institute the suit, and for disposal of the appeal if the suit were found to be within limitation. At the date fixed for hearing on the remand, plaintiff failed to appear, whereupon the lower Appellate Court passed an order to the effect that the appeal

The references are to the Nos. given to the cases in the "Record."

No.

must be dismissed for plaintiffs' default, and that, therefore, defendant's cross-objection failed, and could not be entertained.

Held, that inasmuch as the case had been remanded by the Chief Court merely in order to give plaintiff an opportunity of proving that his alleged agent was duly authorized to institute the suit, the lower Appellate Court should have held, on plaintiff's default, that the previous order of the Divisional Court stood.

Held, further, that when once an appeal has come to a hearing, the Court is seised of the appeal, and an appellant cannot in such a case defeat a cross-objection by withdrawing from the appeal

86

Civil Procedure Code, 1882, Section 582. —See Section 588 (6), *infra*.

" " " " Section 588 (6).—*Appeal from order of Appellate Court returning plaint for amendment or for presentation to proper Court—Civil Procedure Code*, 1882, Section 53, 582, 588 (6).

Held, following *I. L. R.*, III All., 456, that an order of an Appellate Court returning a plaint for amendment or for presentation to the proper Court is not appealable under Section 588 (6) of the Civil Procedure Code, that clause being applicable only to orders passed by Courts of first instance

15

" " " " Section 591.—*Guardian and Wards Act*, 1890, Section 12 (3) (b), 47.—*Preliminary order as to custody of property—Revision—Civil Procedure Code*, 1882, Section 591.—At the hearing of an application, under Act VIII of 1890, for the custody of the person and property of a minor at the time living with his step-mother, the Court by an interlocutory order issued a commission to a certain Munsif to make a list of the property of the minor and to lodge it in Court for safe custody, care being taken that the step-mother was given the necessary utensils, clothes, &c., for her support and maintenance. The step-mother applied to the Chief Court on the Revision Side to set aside the order, but it was objected on behalf of the respondent that, inasmuch as an appeal from the final order of the lower Court in this case lay to the Chief Court, the order in question was not open to revision. On behalf of petitioner it was contended that, the property affected being in her possession, no order passed in appeal could remedy the injury caused by the order, which was *ultra vires* with reference to the provisions of Section 12, sub-section (3), clause (b), of Act VIII of 1890, and, further, that the petitioner was not bound to appeal against an order appointing the respondent guardian, while, in the event of his application being dismissed, she could not appeal against the order in question, which in any event did not affect the decision of the case, in the terms of Section 591 of the Civil Procedure Code.

Held, that the order in question being passed by the Court for the temporary custody and protection of the minor's property, and the custody of the Munsif being in effect the custody, of the Court, did not violate the rule contained in Section 12 (3) (b) of Act VIII of 1890, and that the words "any person" in the said clause could not be interpreted to include the words "the Court."

The references are to the Nos. given to the cases in the "Record."

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| | No. |
| The Court being satisfied that this was not a case in which the revisional powers of the Court should be exercised, dismissed the application | 10 |
| <i>Civil Procedure Code, 1882, Section 622.—See Civil Procedure Code, 1882, Sections 520 and 623, Revision.</i> | |
| " " " " <i>Section 623.—Small Cause Court Act, 1887, Section 25—Second application for revision after rejection of first application—Civil Procedure Code, 1882, Sections 622, 623 (b).</i> | |
| <i>Held, that there is nothing in the Civil Procedure Code, or in the Small Cause Courts Act, 1887, to prevent the Court entertaining a fresh petition under Section 25 of the latter Act after dismissal of a previous petition under the same section.</i> | |
| <i>Held, further, that even if the former order on the previous petition could be held to be a bar to the Court entertaining the subsequent petition, the latter could, and ought to be treated as one for review of judgment, falling under clause (b) of Section 623 of the Civil Procedure Code, which is wide enough to include unappealable orders of the Court hearing the application, whatever may be the status of the Court.</i> | |
| The Court has inherent power to remedy injustice by a re-consideration of an order passed by it, unless precluded by a rule of procedure or practice | 23 |
| <i>Compensation for improvements by mortgages.—See Mortgage, No. 6.</i> | |
| <i>Compromise.—Appeal—Civil Procedure Code, 1882, Sections 375, 622—Offer made by defendant pendente lite to settle case—"Compromise"—Decree based on plaintiff's acceptance of offer—Offer repudiated by defendant—Power of pleader to compromise suit.—See Civil Procedure Code, 1882, Section 375.</i> | |
| <i>Concealment—Fraudulent, of sale.—See Limitation Act, 1877, Section 18.</i> | |
| <i>Confinement—Illegal.—See Civil Procedure Code, 1882, Section 336.</i> | |
| <i>Consideration.—Contract Act, 1872, Section 52—Reciprocal promises—Written Contract—Consideration extraneous to terms of contract.—See Contract Act, 1872, Section 52.</i> | |
| " <i>Promissory Note—Consideration—Inequitable bargain—Burden of proof.—See Promissory Note, No. 1.</i> | |
| " <i>Document, construction of—Promissory Note or acknowledgment of liability—Suit based on document stamped with anna stamp—Admissibility of document in evidence—Right of plaintiff to fall back on original consideration—Evidence Act, 1872, Section 91—Stamp Act, 1879, Section 34.—See Promissory Note, No. 2.</i> | |
| <i>Construction of Document.—Punjab Courts Act, 1884, Section 40—"Questions of law involved"—Burden of proof—Construction of deed.—See Burden of proof, No. 6.</i> | |
| " " " <i>Construction of document—Provision in mortgage-deed regarding interest.—See Interest.</i> | |

The references are to the Nos. given to the cases in the "Record."

No.

Construction of Document.—Suit for pre-emption—Sale or contract to sell—Construction of deed.—See Pre-emption, No. 6.

" " " *Construction of document—Promissory note or acknowledgment of liability—Suit based on document stamped with anna stamp—Admissibility of document in evidence—Right of plaintiff to fall back upon original consideration. See Promissory Note, No. 2.*

" " " *Construction of document—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership.—See Registration Act, 1877, Section 17.*

" " " *Construction of will—Bequest to Hindu widow as malik—Presumption as to nature of bequest.—See Will, No. 3.*

Contract Act, 1872.—Section 23—Contract Act 1872, Section 23—Immoral contract—Suit for rent for house let to prostitute.—Plaintiff, who was the owner of a house which he had let to defendant, a prostitute, in the ordinary way of business, sued for recovery of the rent. It appeared that plaintiff probably knew that defendant was a prostitute, but it was not shown that the house was let for the express purpose of being used as a brothel, or that plaintiff was to have any share in, or receive rent out of, defendant's earnings as a prostitute.

Held, that the agreement was not immoral, and that plaintiff was entitled to recover the rent due thereunder

2

" " *Section 23.—Suit for recovery of money paid to agent for unlawful purpose—Suit instituted before execution of unlawful object—Principal and agent—Contract Act, 1872, Section 23—Locus penitentie. Plaintiff sued on the allegations that he paid a sum of Rs. 300 to the defendant, a friend of his, to procure him a bride; that defendant had represented that this sum was to be paid to the bride's father in advance, and the betrothal performed on the 9th Nauratra; that no betrothal had taken place, and that defendant on being asked to refund had denied the receipt of the money. Defendant denied the transaction altogether. The first Court found that plaintiff's allegations were proved, and that he was entitled to recover, but the Divisional Judge, on appeal, held that the defendant had undertaken to act as a mere procurer, that the contract was opposed to morality and public policy and, following No. 116, Punjab Record, 1880, dismissed the suit without going into the facts. Plaintiff appealed to the Chief Court.*

Held, that inasmuch as, upon the true construction of the transaction, defendant was merely a go-between or agent of the plaintiff for paying the money to the bride's father, the property in the money did not pass to the defendant, but remained with the plaintiff so long as it continued in defendant's hands, or until it was paid over to the father of the intended bride.

Held, therefore, that the suit was maintainable.

A person who pays money to his agent, whether on the agent's representation or of his own motion, for an unlawful purpose is entitled to a locus penitentie, and can call back his money at any time

The references are to the Nos. given to the cases in the "Record."

No.

before the purpose is executed, nor in such a case can the agent, merely because he was entrusted with an unlawful commission, repudiate his liability to refund and appropriate the money to his own use.

I. L. R., XXIII Calc., 962; I. L. R., XVIII, Mad., 388; No. 106, Punjab Record, 1879; No. 50, Punjab Record, 1880; No. 116, Punjab Record, 1880; No. 128, Punjab Record, 1889; Taylor v. Bowers (L. R. I., Q. B. D., 291) and Kearley v. Thomson (L. R., XXIV, Q. B. D., 747), referred to 63

Contract Act, 1872. Section 30.—Provincial Small Cause Court Act, 1887, Section 25—Revision—Wagering transaction—Written contract—Admissibility of evidence to prove that contract was void under Section 30 of the Contract Act—Evidence Act, 1872, Section 92.—See Revision, No. 6.

" " " Section 52.—*Contract Act, 1872, Section 52—Reciprocal promises—Written contract—Extraneous consideration.* Plaintiff had a money decree against one L. S., jagirdar of Majra, and had possession of the village, the revenue being then payable in kind, by virtue of a *patta* from the said L. S. On the 30th May 1891, the latter granted a lease of his *jagir* rights for twenty years to his son, R. D., and the defendant, T. S., in equal shares, stipulating to receive Rs. 500 a year from them, and they, in their turn, undertaking to pay Rs. 225 annually on account of cesses and the *nuzrana* due to Government from the *jagirdar* into the *tahsil*. Of the balance Rs. 275, one-half was to be paid by the lessor to R. D., and out of the other half the defendant, T. S., was to pay Rs. 100 annually to the plaintiff in liquidation of his decree against the lessor, and Rs. 37-8-0 to the lessor himself. On the 31st May 1891, T. S. executed the bond, now sued upon, in favour of plaintiff, whereby he agreed to pay the amount of the plaintiff's decree, which was fixed at Rs. 1,400 in yearly instalments of Rs. 100 each, payable before *Jeth* each *Sambat* year from 1948. In case of default, the whole amount due at the time was to be realizable at once. On the said date plaintiff wrote a document (called a receipt) in favour of T. S. and R. D., by which he declared that he had given up possession of the village which he had been holding under the *jagirdar's patta*, and stipulated that he would pay the revenue due on account of the lands held by him, as owner or mortgagee, to them. Plaintiff having sued to recover Rs. 1,250 on the bond upon the allegation that T. S. had paid him Rs. 150 only of the stipulated instalments, and had failed to pay the rest, T. S. pleaded that the consideration for the bond, *viz.*, the lease of his *jagir* by L. S., had failed as it was incapable of enforcement, and that plaintiff by his own conduct, in paying the *jagir* dues to L. S. contrary to his agreement, was precluded from suing on the bond. It was proved that plaintiff had paid the revenue of his lands direct to L. S. since *Rabi* 1892, and not to the lessees as agreed upon, and that T. S. had realized *batai* for *Kharif* 1891. The first Court accepted T. S.'s plea and dismissed the claim so far as it was based on the bond, but the Divisional Judge, on appeal, decreed plaintiff's suit in full on the ground that the bond was an independent contract, the consideration being the release of L. S. from his liability under the decree. T. S. appealed to the Chief Court.

The references are to the Nos. given to the cases in the "Record."

No.

Held, upon the facts as above stated, that the contract between plaintiff and T. S. was contained in the bond and the so-called receipt read together, and not in the bond alone, and that plaintiff's failure to pay the *jagir* dues to T. S. and R. D., as he had agreed to do, was a sufficient ground for T. S. avoiding his contract as contained in the bond.

The consideration for a contract is extraneous to its terms, and there is no legal objection to proof being given that the recital of the consideration in a written contract is incomplete or is in reality something different 17

Contract Act, 1872.—Sections 60, 61.—See *Partnership*, No. 2.

" " " *Section 217.*—See *Partnership*, No. 2.

" " " *Section 262.*—See *Partnership*, No. 2.

Contradictory Findings—Material irregularity.—See *Burden of proof*, No. 6.

Co-ownership or Partnership.—See *Partnership*, No. 1.

Co-sharers—Sale of share in residential house by one of several.—See *Civil Procedure Code, 1882, Section 263.*

Cross Objections.—See *Appeal in Civil Cases*, No. 9.

Custody of minor's person or property.—See *Guardian and Wards Act, 1890, Section Minor*, No.

Custody of Wife.—See *Husband and Wife*, No. 2.

Custom—I. *Adoption.*—See *Hindu Law—Adoption*, Nos. 1, 2.

" " " *Custom—Adoption of sister's son—Muhammadian Jats of Zira tahsil, Ferozepore District.*

Found, that defendants, upon whom the *onus* rested, had failed to prove that by custom among Muhammadian Jats of the Zira tahsil, Ferozepore District, the adoption of a sister's son is valid in the presence, and without the consent, of the adoptive father's agnates ... 1

" " " *Custom—Adoption of daughter's son—Ghumman Jats of Sialkot District—Perversion of next collaterals to Muhammadanism.*—According to the *Riwaj-i-am* of the Sialkot District, it is competent to a Ghumman Jat to adopt his daughter's son, but a nephew has a prior right to be adopted. Where, however, the nephews had perverted to Muhammadanism, *held*, that it lay upon them to prove that they were entitled to be adopted in preference to a daughter's son, and that their existence rendered the adoption of such daughter's son invalid, and that they had failed to prove this.

Found, under the circumstances of the case, that the *factum* of adoption had been sufficiently proved 25

Custom—II. *Alienation.*—See *Occupancy Rights*, Nos. 2, 3

" " " *Custom—Alienation—Distinction between gifts inter vivos and wills*—Onus probandi—Pathans of Peshawar District.—Although

The references are to the Nos. given to the cases in the "Record."

	No.
a proprietor has, by custom, a plenary power of alienation <i>inter vivos</i> , it does not follow that he has, by custom, a power of alienation by will, and the <i>onus</i> of proving that he has the latter power rests upon the party taking his stand on the will, especially when an alienation by will is void under the personal law of the proprietor.	
The distinction between gifts <i>inter vivos</i> and wills discussed by Chatterji, J.	24
Custom.—II. Alienation.—Custom—Alienation—Gift by sonless proprietor to first cousin who was also his uterine brother—Awans of tahsil Khushab, Shahpur District.—One M., a full proprietor, before his death executed a deed of gift of his land in favour of his first cousin, who was also his uterine brother, and put him in possession. The parties were Awans of mauza Mardwal, Khushab tahsil, Shahpur District.	
Found, that the said gift was valid by custom	49
" " " Custom—Alienation—Suit by remote reversioner in presence of nearer reversioner—Speculative suit.—The rule that where a nearer reversioner is precluded from suing to contest an alienation, or colludes with the alienor, a more remote reversioner can sue, has no application to a purely speculative claim with only the remotest chance of ever having any practical effect.	
In the present case the plaintiffs, according to the genealogical table, had only a very remote chance of succeeding to a small portion of the estate in dispute.	
Held, that plaintiffs were not entitled to sue for a declaration that an alienation should not affect their reversionary rights.	
No. 7, Punjab Record, 1893, and No. 81, Punjab Record, 1896, followed	57
" " " Custom—Alienation—Escheat—Right of proprietary body to contest alienation by widow of childless proprietor—Kangra District—Right to sue.	
Found, that there is no custom by which in the Kangra District, the estate of a childless proprietor escheats (after the death of the widow of such proprietor) to the village community or the owners of the subdivision in which the land is situate.	
Although under the existing revenue system two ingredients of jointness have been introduced among artificially created village communities, viz., (i) joint right in the waste attached to each village, and (ii) joint liability for the revenue assessed on the village, the right of escheat is not a necessary consequence of such jointness, nor has it been declared to be so by any statutory provision.	
Held, further, that even if by custom the widow of a childless proprietor was incompetent to alienate, or to give a valid title, except for necessity, it was not open to one who was not a reversioner to sue to set aside her act, and that in such a case the plaintiff must succeed on the strength of his own title and cannot derive help from the widow's incapacity to alienate.	

The references are to the Nos. given to the cases in the "Record."

	No.
The question as to the reversionary rights of the proprietary body in such cases discussed historically by <i>Chatterji, J.</i>	61
<i>Custom—II. Alienation.—Custom—Alienation—Gift by widow in favour of daughter married after death of widow's husband—Khanadamadi—Gujars of Gujrat—Riwaj-i-am.</i> —In a case in which the parties were Gujars of Gujrat District, <i>found</i> , that, the right which a landowner has to make his daughter and her issue heirs in <i>Khanadamadi</i> cases cannot be extended in favour of such landowner's widow, and that the widow is not entitled by custom to gift her late husband's land to her daughter ...	67
" " " <i>Custom—Alienation by sonless proprietor—Locus standi of remote collaterals to object to alienation—Dhillon Jats, Lahore District.</i> —The right of male agnates to contest alienations by sonless proprietors is founded on the fundamental principles on which land is held among agricultural tribes in the Punjab, and so far from there being any <i>a priori</i> presumption against the <i>locus standi</i> of male agnates beyond a certain degree of relationship to object to such alienations, the presumption is exactly the reverse.	
<i>Held</i> , therefore, in a case in which the parties were Dhillon Jats of the Lahore District, that plaintiffs who were related to the alienor in the ninth degree were competent to object to the alienation in question.	
The mere facts that the property in dispute was situate in a large place (<i>mauza</i> Basin), which was almost a town, that land was held there by various tribes, and that numerous alienations had taken place therein (but almost all subsequently to 1893) without objection by male agnates, <i>held</i> not to be <i>per se</i> sufficient to establish the right of a sonless proprietor to alienate without necessity	75
" " " <i>Custom—Alienation—Gift to sister's son followed by possession and mutation of names—"Ancestral property."</i> —In a case in which the property in dispute had been acquired by one K. jointly with his brothers, but had never been held by their father, <i>held</i> , that the said property was not ancestral property <i>qua</i> K.'s collaterals.	
<i>Held</i> , therefore, that a gift of such property, followed by possession and mutation of names, by K. in his lifetime to his sister's son was not invalid by custom.	
Mutation of names by itself does not in every case constitute a valid transfer, but it is good evidence of such transfer	76
" " " <i>Custom—Alienation—Suit by son in presence of his father to contest an alienation by an agnate—Locus standi of plaintiff—Sodhi Khattris of tahsil Zira, Ferozepore District.</i> —In a suit by plaintiff to contest an alienation by his father's uncle, it appeared that plaintiff's father was alive, but refused to join in the suit. The question referred to the Full Bench was whether, under such circumstances, plaintiff had any <i>locus standi</i> to sue.	
<i>Held</i> , that under Customary law by which the parties were governed, plaintiff was entitled to sue to set aside the alienation in question, and that the District Judge had erred in dismissing his suit on the ground that he had no <i>locus standi</i>	84

The references are to the Nos. given to the cases in the "Record."

No.

Custom—III. Inheritance.—See *Abandonment of Worldly Affairs.*

" " *her father's first cousin—Kanets of Kangra District.*
Custom—Succession—Right of daughter to succeed to

Found, that plaintiff had failed to prove that, by custom among Kanets of Kangra District, a woman is entitled to succeed to the estate of her father's first cousin after the succession and subsequent death of the latter's widow, to the exclusion of the agnatic heirs.

Semble: Among Kanets of the Kangra District, a daughter is entitled to succeed to her father's estate to the exclusion of remote collaterals 3

" " *Limitation Act, 1877, 2nd Schedule, Article 93—Suit for declaration that an alleged will was a forgery, and that testator had no power to make such will—Custom—Succession of daughter.*—On the death in 1866 of one M. M., who left a widow and three daughters, mutation of names in respect of his property was effected in favour of the widow, who applied in 1877 to have mutation in respect of three-fourths of the said property effected in favour of the daughters, in virtue of a will purporting to have been executed in their favour by M. M. shortly before his death. This application was resisted by the present plaintiffs, collaterals of M. M., and rejected on the ground that the will was probably a forgery. In 1872 and 1887 the widow dealt with the property in suit as her own, and on the second occasion plaintiffs obtained a decree declaring that her dealings with the property did not affect their reversionary rights. In 1894 the daughters sued the widow for possession of three-fourths of the said estate and obtained a decree on a confession of judgment. Plaintiffs, who were no parties to the said suit, in November 1894, instituted the present suit for a declaration that (i) the said will was a forgery; (ii) M. M. had no power to make such a will, and that if genuine, it was never acted on and was inoperative; and (iii) that the decree in favour of the daughters was collusive and inoperative against their rights as reversioners. Defendants pleaded that plaintiffs' suit was barred by limitation; that the will was genuine; and that, in any event, the daughters were entitled to succeed in preference to male collaterals such as the plaintiffs.

Held, (i) that the proceedings in 1894 gave rise to a fresh cause of action, and that the suit was within limitation; (ii) that the alleged will had not been proved to be genuine; and (iii) that no special custom had been proved to exist among the parties whereby daughters were entitled to succeed in the presence of male collaterals 5

" " *Custom—Succession—Ala and adna maliks—Mauza Manabad, tahsil Moga, Ferozepore District.*

Held, that in mauza Manabad, tahsil Moga, Ferozepore District, an ala malik is merely entitled, as a talugdar, to 5 per cent. on the revenue, and, further, that on the death of an adna malik without issue, the latter's estate does not revert to the ala maliks, but to the collaterals of the deceased.

Semble: In the said village, which is divided into pattis, on the death of an adna malik his land would, for default of nearer heirs, become shamilat of the patti, and be divided among the pattidars ... 9

The references are to the Nos. given to the cases in the "Record."

No.

Custom—III. Inheritance—Custom—Succession—Legitimacy—Chaddar-andazi marriage, proof of.—Plaintiff claimed to succeed to part of the estate of one K., on the ground that he was the legitimate son of K. by one Mussammatt R. D., who, he alleged, had been married by *chaddar-andazi* to K. after the death of her former husband, one M. Defendants denied that Mussammatt R. D. had ever been married to K., and that plaintiff was K.'s son. It appeared that after the death of M., K. and Mussammatt R. D. lived together, and were regarded by the *baradari* as man and wife, and that plaintiff after K.'s death was entered in the revenue records as K.'s son. The parties were residents of the Garshankar *tahsil*, Hoshiarpur District.

Held, that under the circumstances abovementioned it had been sufficiently proved that the ceremony of *chaddar-andazi* had actually been performed, and that, therefore, plaintiff was entitled to succeed as prayed.

Quære: Whether in the said district the ceremony of *chaddar-andazi* is necessary to validate marriage

13

Custom—Succession—Respective rights of daughters and collaterals—Sabzani Lund Bilochis, Dera Ghazi Khan District—Riwaj-i-am.

Found, that defendants had failed to prove that, by custom among Sabzani Lund Bilochis of Dera Ghazi Khan District, daughters are entitled to succeed in preference to collaterals.

In such cases the mere fact that the daughter has married in the tribe and is in actual possession of the land gives her no right of succession superior to that of the collaterals

37

Custom—Succession to childless proprietor—Exclusion of near collaterals by proprietors of village—Village founded within boundaries of old village—Right of collaterals residing in latter to succeed to land in former—Succession of adopted son in his natural family—Riwaj-i-am.—In the present case it appeared that *mauza* Ferozabad had been founded by the grandfather of the two deceased proprietors, the succession to whose lands was in dispute, within the boundaries of *mauza* Rania. The two proprietors having died childless, the proprietors of *mauza* Ferozabad claimed to exclude the near collaterals who lived in *mauza* Rania, and based their claim on an entry in the *Wajib-ul-arz* to the effect that on the death of a landowner without issues his near collateral should succeed provided he lived in the same *patti*; otherwise the landowners of that *patti* should succeed. There was no such entry in the *Wajib-ul-arz* of *mauza* Ferozabad, but it was contended that the entry in question applied equally to that village inasmuch as it had been founded from the other.

Held, that the said entry was very unusual and not very reasonable, and should not, therefore, be extended to *mauza* Ferozabad so as to give the proprietors of that village a preferential right over the near collaterals.

Held, further, that the decision of the Court in No. 64, *Punjab Record*, 1893, did not apply to the present case, inasmuch as the

The references are to the Nos. given to the cases in the "Record."

No.

founder of *mauza* Ferozabad did not go and acquire land in a remote village, but merely assisted in founding a new village within the boundaries of his old village, and also because the collaterals, as descendants of the founder, were claiming property which, so far as they were concerned, was ancestral property.

Held, also, as regards the conflicting claims of the collaterals *inter se*, that an adopted son and his descendants are entitled to succeed in the natural family of such adopted son

68

Custom—III. Inheritance.—Custom—Succession—Chundawand or Pagwand rule—Sindhu Jats of Bagiana Kalan, Chunian tahsil, Lahore District—Burden of proof.—In a case in which the parties were Sindhu Jats of Bagiana Kalan, Chunian tahsil, Lahore District, *found*, that plaintiffs, upon whom the *onus* rested, had failed to prove that in questions of succession the parties were governed by the *Chundawand* and not by the *Pagwand* rule

74

" " Custom—Succession—Suit between co-proprietors of village in which the land was situate and deceased's near agnates residing in another village—Finding in a previous suit that one of the co-proprietors was deceased's collateral, effect of—Res judicata—Dhillon Jats of Naraingarh, Amritsar District.—Plaintiffs, who were residents of Bhutiwala in the Ferozepore District, claimed certain land left in Naraingarh, Amritsar District, by one Mussammat Premi, widow of Attar Singh, a Dhillon Jat, on the ground that they were descendants of Budh Singh, grandfather of Attar Singh, one plaintiff being his son and the others grandsons and great-grandsons. The defendants were Dhillon Jats of Naraingarh, but claimed no relationship with the deceased and belonged to a different *taraf* to that of Attar Singh. On the death of Mussammat Premi, defendants obtained mutation of names in their favour despite the objections of plaintiffs, who therefore instituted the present suit. In the first Court defendants pleaded, *inter alia*, that plaintiffs were not the agnates of the deceased's husband, and that being residents of another village and district, and having had no connection with Naraingarh or the family of the deceased, they were excluded by law and custom. The first Court drew issues, in accordance with the pleadings, and decided them all in favour of plaintiffs. Defendants appealed to the Chief Court on the same grounds as were urged in the lower Court, and at the hearing it was also contended on their behalf that plaintiffs' claim was barred by a judicial decision of the then Assistant Commissioner of Amritsar, dated 25th August 1871, by which defendants were declared reversioners of the deceased widow, and obtained a decree setting aside, as far as their interests were concerned, a certain mortgage effected by her of part of the land left by her husband. The ground upon which the defendants' contention was based was that in the former suit the widow represented the interests of the reversioners, and that the decision that one of the defendants was her reversioner bound the present plaintiffs if they were the persons by agnatic descent entitled to succeed to the estate left by her.

Held, overruling the said contention, that the finding in the former case was merely to the effect that the defendant in question was a collateral of the widow, and as such was competent to contest the

The references are to the Nos. given to the cases in the "Record."

No.

widow's mortgage, and that the said finding in no way precluded plaintiff from proving that they were nearer collaterals and had a preferential claim to succeed to the property.

Found, upon the evidence that plaintiffs were nearer collaterals than the defendants.

Held, therefore, that the plaintiffs' relationships being established, they were the *warisan ek jaddi* of the deceased widow's husband, and their common ancestor had been in possession of the land in suit, and that in such a case there was no authority for holding that the collaterals, because residents in another village, were excluded by the other proprietors, in the deceased's village, though not related to him 78

Custom—III. Inheritance.—Custom—Succession—Issue of woman whom a man could not legally marry, but treated by him as his wife—Varaich Hindu Jats of tahsil Gujranwala—Riwaj-i-am.

Found, that no custom had been proved amongst Varaich Hindu Jats of Gujranwala tahsil whereby, when a proprietor has throughout his life lived with a woman whom he could not legally marry and has treated her as his wife and his sons by her as ordinary sons, such sons succeed to his estate on his death 87

Custom—IV. Marriage.—See Custom—III. Inheritance, No. 4.

Custom—V. Pre-emption.—See Pre-emption.

D.

"Dakhil Kharij."—See Custom—II. Alienation, No. 7.

Damages.—Monthly tenant wrongfully holding over—Damages.—See Landlord and Tenant, No. 2.

Death of Plaintiffs—Pendente lite.—See Civil Procedure Code, 1882, Section 365, and Pre-emption, No. 12.

Declaratory Decree—Speculative suit.—See Specific Relief Act, 1877, Section 42.

Decree.—Civil Procedure Code, 1882, Section 108—Money paid into Court—Ex-parte decree upheld—Application by decree-holder for payment of deposit—Limitation Act, 1877, Act, 179—Execution of decree.—See Civil Procedure Code, 1882, Section 108.

„ *Civil Procedure Code, 1882, Section 136—"Decree"—Appeal.—See Civil Procedure Code, 1882, Section 136.*

„ *Civil Procedure Code, 1882, Section 230—Execution of decree—Limitation Act, 1877, Article 179 (iv).—See Civil Procedure Code, 1882, Section 230.*

„ *Application for execution of whole decree by one of several joint decree-holders—Dismissal of application—Appeal.—See Civil Procedure Code, 1882, Section 231.*

„ *Decree for pre-emption—Civil Procedure Code, 1882, Section 244—Question whether decree-holder has paid money into Court within time.—See Civil Procedure Code, 1882, Section 244.*

The references are to the Nos. given to the cases in the "Record."

No.

Decree.—*Validity of attachment in execution of decree.*—*Civil Procedure Code, 1882, Sections 274, 276.*—See *Civil Procedure Code, 1882, Section 274.*

„ *Arrest and imprisonment in execution of decree—Subsequent application stating judgment-debtor's intention to apply to be declared insolvent—Rejection of application—Illegal confinement—Duress.*—See *Civil Procedure Code, 1882, Section 336.*

„ *Decree in favour of a plaintiff who was dead at the time.*—See *Civil Procedure Code, 1882, Section 365.*

„ *Pre-emption—Decree directing money to be paid into Court by certain date, but not stating consequences of non-compliance—Execution of decree—Limitation Act, 1877, Article 179.*—See *Limitation Act, 1877, 2nd Schedule, Article 179, No. 3.*

„ *Declaratory decree—Speculative suit.*—See *Specific Relief Act, 1877, Section 42.*

Dedication of road to Public.—*Easement—Right of way—Public or private road—"Question of law"—Limitation Act, 1877, Section 26—User of road by public for less than 20 years—Presumption as to dedication—English law—See Easement.*

Diluvion and Alluvion.—See *Alluvion.*

District Judge.—*Punjab Courts Act, 1884, Sections 26, 75—"Business" and "functions" of District Court—Power of District Judge to assign function of trying a case to Additional District Court—Case in excess of pecuniary limits of latter Court's jurisdiction.*—Section 75 of the Punjab Courts Act must be construed in consonance with Section 26 of the Act, and it is therefore not competent to a District Judge by any act of his under sub-section (2) of Section 75 to extend the powers conferred on Judicial Officers by the Local Government under Section 26.

The "business in the Court of the District Judge" spoken of in Section 75 (1) of the Act means business it has to dispose of as the District Court, and the "function" mentioned in sub-section (2) of the said section are functions proper to such Court, and must be such as a Sub-Judge of the highest class is unable to discharge, and do not mean the mere trial of civil suits of the value of over Rs. 5,000

46

Districts.—*Immovable Property situate in different, suit for.*—See *Cause of Action.*

Document, construction of.—See *References under Construction of Documents.*

Documents, order to produce.—See *Civil Procedure Code, 1882, Section 130.*

Duress.—*Civil Procedure Code, 1882, Sections 336, 337 A—Arrest and imprisonment in execution of decree—Subsequent application stating judgment-debtor's intention to apply to be declared insolvent—Rejection of application—Illegal confinement—Duress.*—See *Civil Procedure Code, 1882, Section 336.*

E.

Easement.—*Easement—Right of way—Public or private road—"Question of law"—Limitation Act, 1877, Section 26—User of road by public for less*

The references are to the Nos. given to the cases in the "Record."

No.

than 20 years—Presumption as to dedication—English law.—The principles of the English law regarding the presumed dedication of a road to the public arising from user of such road by the public, being founded on reason and common sense and conducive to public convenience, are applicable to India.

Held, therefore, that the user of a road by the public, openly and as of right, is sufficient, apart from the law laid down in the Limitation Act, 1877, Section 26, to raise a presumption of its dedication to their use, though such presumption might be rebutted by evidence of the owner's intention that the public should only have a permissive user.

In the present case the evidence clearly showed that the road in dispute had been used as a public road for at least 10 years prior to suit, but the Divisional Judge, treating the case as one of prescription, found in favour of defendants, because 20 years had not elapsed since the road was opened (Section 26 of the Limitation Act, 1877).

Held, under the circumstances as above set forth, that there was a presumption that the road had been dedicated to the use of the public, and *found*, upon the evidence and facts of the case, that defendants had failed to rebut such presumption.

The right of the public to pass over a public road is not in the nature of an easement properly so called, nor is it acquired by prescription under Section 26 of the Limitation Act, 1877.

A preliminary objection on behalf of the defendants that there was no ground for admitting a further appeal in the case as there was no "question of law" involved, overruled on the grounds that the questions (a) whether plaintiff had not acquired a right of way over the road in dispute either by long user or grant; (b) whether the road came under the category of a public or a private road, involved consideration of points of law, and were not simple questions of fact.

Held, further, that the Divisional Judge's error in law in deciding the point under Section 26 of the Limitation Act was of itself a sufficient ground for admitting a further appeal, though it was not the ground on which the appeal was admitted by the Judge in Chambers

... 62

Ejectment.—Landlord and tenant.—Suit for possession by tenant who had been ejected—Suit instituted more than one year after ejectment—Jurisdiction of Civil Court—Punjab Tenancy Act, 1887, Sections 50, 77 (3) (9).—See Landlord and Tenant, No. 3.

Escheat.—Custom—Alienation—Escheat—Right of proprietary body to contest alienation by widow of childless proprietor—Right to sue—Kangra District.—See Custom—II. Alienation, No. 6.

Estoppel.—Suit for possession on ground that a certain sale was invalid as against plaintiff—Plea by defendant that plaintiff's acquiesced in sale—Acquiescence—Estoppel.—See Acquiescence.

The references are to the Nos. given to the cases in the "Record."

No.

Estoppel.—Mortgage by widow—Decree of foreclosure against widow—Regulation XVII of 1806—Regularity of proceedings, presumption as to—Suit by reversioners for recovery of land after death of widow—Limitation Act, 1877, 2nd Schedule, Article 141—Res judicata—*Estoppel.*—See *Limitation Act*, 1877, 2nd Schedule, Article 141.

„ Document, construction of—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership—Abandonment—*Estoppel*—*Limitation Act*, 1877, Articles 142, 144.—See *Registration Act*, 1877, Section 17.

Evidence.—Mortgage-deed relating to immovable property compulsorily registrable, but registered in wrong Registry Office—Admissibility of deed in evidence—*Fraud.*—See *Registration Act*, 1877, Section 49.

Evidence Act, 1872.—Section 91.—Document, construction of—Promissory note or acknowledgment of liability—Suit based on document stamped with anna stamp—Admissibility of document in evidence—Right of plaintiff to fall back on original consideration *Evidence Act*, 1872, Section 91—*Stamp Act*, 1879, Section 34.—Plaintiff in this plaint alleged that “on the 17th June 1897 defendant raised Rs. 500, cash, at Lahore, “and wrote the promissory note. He agreed to repay the money by “monthly instalments of Rs. 100, and further agreed to pay Re. 1 “per cent. per mensem as interest,” that demand for payment had been made, and that the cause of action arose on the expiry of the period for the payment of each instalment, the suit being filed on the 14th October 1897 for three instalments and interest as above stated. The document referred to had affixed to it an anna stamp, and was in the following terms:—“Received from Mr. E. G., Superintendent, Punjab Dairy, the sum of Rs. 500 only, as advance, repayable by instalments of one hundred per month, and to bear interest at Rs. 12 per cent.—17th June 1897.” It was signed by the defendant.

The first Court dismissed the suit on the ground that the document upon which it was based was a promissory note, payable otherwise than on demand, and, being insufficiently stamped as such, could not, under Section 34 of the Stamp Act, 1879, be admitted in evidence for any purpose, even on payment of a penalty, in a civil suit. Plaintiff applied for revision of this order, and it was contended on his behalf that the document bore a dual character, as a promissory note and as an admission of liability, and was admissible in evidence as an acknowledgment. It was further contended that the Rs. 500 were made up of advances for milk made at various times, and that plaintiff was in any event entitled to fall back upon the original consideration of the contract.

Held, that the document upon which plaintiff based his suit was a promissory note, payable otherwise than on demand, and, being insufficiently stamped as such, could not, under Section 34 of the Stamp Act, be received in evidence or acted upon in a civil suit.

Held, further, that plaintiff was not entitled to aver against his plaint, or to amend his plaint in such a manner as to sue on the original consideration.

Held, also, that from the frame of the suit it was clear that the document sued on embodied the contract between plaintiff and defend-

The references are to the Nos. given to the cases in the "Record."

No.

nnt, and was the contract out of which defendant's liability arose, and that under Section 91 of the Evidence Act the document was the best evidence of the contract, and no other evidence of the terms thereof could be given 92

Evidence Act, 1872.—Section 92.—Provincial Small Cause Court Act, 1887, Section 25—Revision—Wagering transaction—Written contract—Admissibility of evidence to prove that contract was void under Section 30 of the Contract Act—Evidence Act, 1872, Section 92.—The Judge of the Small Cause Court dismissed plaintiffs' suit on the ground that the evidence proved that the written agreement sued upon, which purported to be one for sale of silver, was not a bona fide transaction, no actual interchange of silver being contemplated, but merely an adjustment of profit and loss with reference to a difference in the market rates. Plaintiffs applied to the Chief Court for revision of the order of dismissal on the ground, (1) that there was no evidence to show that delivery of silver was not intended, and (2) that oral evidence was inadmissible to contradict the terms of the written agreement according to which silver was to be delivered.

Held, that as there was evidence on which the Judge of the Small Cause Court might base his finding that the transaction was a wager, that finding should not be disturbed on revision.

Held, further, that the oral evidence was admissible, under the first proviso to Section 92 of the Evidence Act, for the purpose of invalidating the written agreement.

I. L. R., XVII Mad., 480, and I. L. R., XII Bom., 585, followed; I. L. R., IX., Calc., 791, not followed 85

Execution of Decree.—See References under Decree.

F.

Faqir.—See Abandonment of Wordly Affairs.

Ferry.—Suit by Lessee of Government Ferry for recovery of tolls.—See Small Cause Court, 1887, 2nd Schedule, Article 13.

Foreign Court.—Suit based on void judgment of.—See Limitation Act, 1877, Section 14.

Fraud.—Mortgage-deed relating to immovable property compulsorily registrable, but registered in wrong Registry Office—Admissibility of deed in evidence—Fraud.—See Registration Act, 1877, Section 49.

“ *Pre-emption—Fraudulent concealment of sale—Limitation Act, 1877, Section 18, knowledge of facts, presumption as to.—In a suit for pre-emption it appeared that the deed of sale, which was described in two places in itself as a mortgage-deed, was dated 12th December 1876, and was registered on the same date at the tahsil, three or four miles from the village in which the land in suit was situate; that the marginal witnesses were residents of villages other than that in which the vendor and vendee resided and where the land was situate; that from 1876 till 1895 the vendee continued to be recorded, as before, as tenant of the said land; that on the 19th September 1894, a measurement clerk reported that a sale had taken place, and that the vendee was in*

The references are to the Nos. given to the cases in the "Record."

No.

possession; that on the 1st October 1895 mutation of names was effected in the vendee's favour by order of the Tahsildar, and that the residents of the village in which the land was situate, as a body, were not aware of the sale. The plaint was filed in February 1896, concealment of the sale being therein alleged, and the pre-emptor, when examined before issues were framed, pleaded fraud by which he had been deceived. The first Court decreed the claim, finding that the fact of the sale became known to plaintiff on the 1st October 1895, and that there had been fraudulent concealment thereof, but the Divisional Judge, on appeal, dismissed the suit as barred by limitation, calculating either from the date of registration or from the 19th September 1894.

Plaintiff appealed to the Chief Court, and in addition to the facts above-mentioned, on which his allegation of fraudulent concealment was based, further urged in support of such allegation the fact that on the death of the vendor in 1881, his son was recorded as owner in his place.

Held, that though each of the facts above set forth, when taken alone, might be merely suspicious, yet when found to concur, they established fraudulent concealment within the meaning of Section 18 of the Limitation Act.

Held, further, that, fraudulent concealment having been established respondent, upon whom the *onus* rested, had not proved that the appellant had knowledge of the sale more than one year before suit, which was therefore within time

12

Fraud—*Punjab Land Revenue Act, 1887, Section 158 (2) (xvii), (xviii).*—*Suit to set aside award of arbitrators appointed by Revenue Officer in partition proceedings*—*Allegation of fraud, but no dispute as to title.*—Plaintiffs sued to set aside an award of arbitrators appointed by a Revenue Officer, under Chapter X of the Punjab Land Revenue Act, 1887, in a dispute between the parties about partition of land. No question as to title was raised, but plaintiffs sued on the ground of fraud, inasmuch as they had not been given the land which had been promised to them.

Held, that the suit would not lie, plaintiffs' only course being to press their objections before the Revenue Officer, and thereafter appeal to the superior Revenue authority

52

G.

General Clauses Act, 1868.—*Pre-emption*—*Punjab Laws Act, 1872, Section 9*—*Rights to use water of perennial stream*—*"Immovable property"*—*General Clauses Act, 1868, Section 2 (5).*

Held, that inasmuch as the water of a perennial stream comes out of land, the right to use such water is "a benefit arising out of land," and is, therefore, "immovable property" within the meaning of Section 2 (5) of the General Clauses Act, 1868, so as to found a suit for pre-emption in respect of a sale thereof under Section 9 of the Punjab Laws Act, 1872

11

Gossain Fakirs.—See *Abandonment of Wordly Affairs.*

Government Ferry—*Suit by Lessee of, for recovery of tolls.*—See *Small Cause Court Act, 1887, 2nd Schedule, Article 13.*

The references are to the Nos. given to the cases in the "Record."

No.

Guardian and Ward.—*Res judicata*—*Omission by guardian ad litem of minor to appeal against decree*—*Gross negligence on part of guardian*—*Effect of such decree*.—Where in a previous suit a decree was passed against the present plaintiff, who at the time was a minor, and was duly represented by his mother as his guardian *ad litem*, held, that the omission by the latter to appeal on his behalf from such decree, notwithstanding that there were excellent grounds, both in law and on the facts, for an appeal, amounted to gross negligence on her part, and that under such circumstances it would be contrary to law and equity to hold the plaintiff bound by the former decree.

The position of a guardian *ad litem* of a minor being that of a trustee, he is bound strictly to act in the interests of the minor, and he has not the liberty, as long as he retains his position, of abandoning the case as he would have were it his own, unless such abandonment is clearly in the interests of the minor. Every case must be judged by its own facts, and for the purpose of finding out whether such guardian was guilty of laches or fraud in previous proceedings, the Court has power to go into them and to form its own conclusions regarding them

35

Guardian and Wards Act, 1890.—*Application to remove guardian on ground of failure to furnish security*—*Ex-parte order removing guardian*—*Application to set aside ex-parte order procedure*.—Appellant was duly appointed guardian and received a certificate, but the order of the Court appointing him, while directing him to file security, did not specify the amount thereof, or the time within which it was to be filed. Subsequently, on an application by respondent, the District Judge in an *ex-parte* order directed that the guardian should be removed on the ground that he had not furnished security within a reasonable time. The guardian's application to have the *ex-parte* order set aside was rejected on the ground that his only remedy was by way of appeal therefrom.

Held, that the District Court had erred in holding that the application to have the *ex-parte* order set aside could not be entertained, the provisions of the Civil Procedure Code as regards procedure being applicable to cases under the Guardian and Wards Act, unless the contrary is expressly declared.

Held, further, that the guardian should not have been removed for failure to give security, until a distinct order had been passed fixing the amount and the time within which it was to be filed, and the guardian had thereafter failed to comply with such order ...

7

" **Guardian and Wards Act, 1890, Sections 12 (3) (b), 47**—*Preliminary order as to custody of property*—*Revision*—*Civil Procedure Code, 1882, Section 591*.—At the hearing of an application under Act VIII of 1890 for the custody of the person and property of a minor at the time living with his step-mother, the Court by an interlocutory order issued a commission to a certain Munsif to make a list of the property of the minor and to lodge it in Court for safe custody, care being taken that the stepmother was given the necessary utensils, clothes, &c., for her support and maintenance. The step-mother applied to the Chief Court on the revision side to set aside the said

The references are to the Nos. given to the cases in the "Record."

No.

order, but it was objected on behalf of the respondent that, inasmuch as an appeal from the final order of the lower Court in this case lay to the Chief Court, the order in question was not open to revision. On behalf of petitioner it was contended that, the property affected being in her possession, no order passed in appeal could remedy the injury caused by the order, which was *ultra vires* with reference to the provisions of Section 12, sub-section (3), clause (b), of Act VIII of 1890, and, further, that the petitioner was not bound to appeal against an order appointing the respondent guardian, while, in the event of his application being dismissed, she could not appeal against the order in question, which in any event did not affect the decision of the case, in the terms of Section 591 of the Civil Procedure Code.

Held, that the order in question being passed by the Court for the temporary custody and protection of the minor's property, and the custody of the Munsif being in effect the custody of the Court, did not violate the rule contained in Section 12 (3) (b) of Act VIII of 1890, and that the words "any person" in the said clause could not be interpreted to include the words "the Court."

The Court being satisfied that this was not a case in which the revisional powers of the Court should be exercised, dismissed the application 10

Guardian and Wards Act, 1890.—Guardian and Wards Act, 1890, Sections 3, 7—"Will or other instrument"—Nuncupative will—Appointment of minor's heir as guardian of property.

Held, that the provisions of Section 7 of the Guardian and Wards Act, 1890, do not apply to nuncupative wills.

Held, further, that inasmuch as a minor's heir is peculiarly interested in the good management of the property to which he hopes to succeed, there is no objection to the appointment of such a person as guardian of the minor's property as distinct from the minor's person 54

H.

*Hindu Law—Adoption.—Adoption of brother-in-law's son—Hindu Law or Custom—Sikh Khatri of Rawalpindi—Burden of proof—"Agricultural tribe."—One K. S., a Sikh Khatri, of the Bindra section, having adopted G. S., his wife's brother's son, plaintiff sued for a declaration that the adoption was invalid by custom and would not affect his reversionary rights. It appeared that the families of plaintiff and K. S. had held land for at least two generations, and that the total ancestral land in the possession of K. S. was about 4 *ghumaos* 5 *kanals*. The lower Courts decreed plaintiff's claim on the ground that defendants had failed to prove that the said adoption was valid by custom.*

Held, that though the primary rule of decision in a suit of the present character is custom, there is no necessary legal presumption that a particular custom bearing on the point in issue exists, Section 5 of the Punjab Laws Act, 1872, only casting on the Court the duty of enquiring whether there is any such custom binding on the parties, and, if there is, to decide the suit in accordance therewith.

The references are to the Nos. given to the cases in the "Record."

No.

Held, further, that under Hindu Law, which was the personal law of the parties, the adoption in question was perfectly valid.

Held, therefore, that plaintiff who was suing to set aside an adoption, which was valid by the personal law of the parties, on the ground that it was invalid by custom, must fail if the custom upon which he relied was not proved, and that he was accordingly bound by the rules of pleading to establish that custom affirmatively.

Held, further, that inasmuch as Khatri do not ordinarily form an agricultural but a trading community, the usages of agriculturists cannot be presumed to apply to them, and therefore that plaintiff could not claim the benefit of the presumption laid down by the Full Bench in No. 50, *Punjab Record*, 1893, so as to shift the burden of proof from himself to defendants.

Found, upon the evidence, that plaintiff had failed to prove that by custom among the parties the adoption of a wife's brother's son was invalid

94

Hindu Law.—Adoption of daughter's son—Hindu Law—Banias of Jagraon
—Burden of proof—Omission to perform certain ceremonies.—Plaintiff sued for a declaration that a deed of adoption whereby defendant No. 1, plaintiff's brother, adopted his daughter's son, was invalid, and would not affect plaintiff's reversionary rights. Plaintiff admitted the *factum* of adoption, but contended that it was illegal by "law and custom," and was, moreover, invalid owing to the non-performance of certain necessary ceremonies. The parties were *banias* of Jagraon. The lower Courts dealt with the question as one of custom, and dismissed the suit on the ground that the adoption had not been proved to be invalid by custom among the parties.

Held, that the parties being *bania* residents of a town, of the ordinary mercantile class, were governed by Hindu Law and not by custom, and that plaintiff had failed to prove that under Hindu Law a daughter's son was not a proper person to be adopted.

Held, further, that the *factum* of adoption not being disputed, and the daughter's son being a person who might legally be adopted, the adoption was not invalid on account of the omission of any particular ceremony.

I. L. R., XVII All., 294, followed

97

Hindu Law—Alienation.—Hindu Law—Liability of son for father's debt—Onus of proving that debt was incurred for immoral purposes—Minor son—"Antecedent," meaning of.—There being no reason why a minor son should not just as much as an adult son be under a pious obligation to discharge his father's debts, the *onus* of proving that a father's debts were immoral, when it is sought to set aside an alienation by the father, lies no less upon minor sons than upon adult sons, the former being in no better position than the latter.

In 1892 one G. C. mortgaged six houses to one T. D. for Rs. 5,500 by two deeds, and out of the consideration Rs. 3,000 was for the payment of an antecedent debt and Rs. 2,500 was taken by G. C. in cash. G. C.

The references are to the Nos. given to the cases in the "Record."

No.

then rented the houses from T. D., and executed leases to him. In 1894 T. D. brought two suits against G. C. for possession of the houses, and obtained two decrees for possession with costs in the two cases amounting, respectively, to Rs. 329 and Rs. 327. On the 24th August 1895 T. D. executed the decrees for costs and attached the six houses, and further prayed that a sum of about Rs. 7,000 which was due to him under the mortgage-deed should be reserved and the houses sold, the proceeds being applied towards the satisfaction of the sums due on the decrees. The minor son of G. C. objected to the attachment, but his objection was dismissed. He accordingly filed the present suit on the 20th February 1896 for release of the houses from attachment, and it was contended on his behalf that G. C.'s debts were incurred for immoral purposes, and that the *onus* of proving that they were not so rested in this case upon T. D. because (a) the son was a minor, and (b) Rs. 2,500 of the original debt having been taken in cash by G. C. at the the time of mortgage was not an antecedent debt.

Held, that the minority of the son was no reason why the burden of proof should be shifted from him.

Held, further, that inasmuch as there were decrees for Rs. 329 and Rs. 327 against G. C. at the time when plaintiff instituted the present suit, such decrees were antecedent debts which plaintiff was under a pious obligation to pay unless he could prove that they bore an immoral taint.

"Antecedent debt" means with regard to a mortgage "debt antecedent to the transaction." and in the case of a proceeding by suit "a debt antecedent to the suit."

I. L. R., XX Calc., 328, followed.

As regards the contention that though the amounts of the decrees might be antecedent debts, yet that this did not apply to the whole of the mortgage money due on the mortgages, *held*, that inasmuch as the decrees for possession and the order in execution for sale of the houses subject to T. D.'s mortgages substantially charged the whole mortgage-money on the property, plaintiff in suing to set aside orders passed against him in furtherance of T. D.'s remedy for his debt, was attempting to set up his right against the creditor's remedy for his debt, which on the authority of *I. L. R., XIII Calc., 21*, he could not be allowed to do.

Found, on the evidence, that plaintiff had failed to prove that the debts of G. C. were for immoral purposes

72

Holiday—Hearing civil cases on.—See *Punjab Courts Act, 1884, Section 67*.

Husband and Wife.—*Punjab Courts Act, 1884, Section 40 (i) (ii)*—"Point of law involved"—Question as to burden of proof—Separation deed between husband and wife—Allegations of misconduct on part of wife—Revision—*Civil Procedure Code, Section 622*.

The Divisional Judge granted a certificate of appeal, under Section 40 of the *Punjab Courts Act*, to the effect that "a question of law is involved, namely, whether a child born in the lifetime of its father

The references are to the Nos. given to the cases in the "Record."

No.

"is not presumed to be a legitimate one, and whether the *onus probandi* was not on the defendant-appellant to prove the unchastity of his wife, and whether it is not a question of 'no proof' about the finding of unchastity of the plaintiff-respondent, and that the case is, in my opinion, of sufficient importance to justify a further appeal."

Held, that the certificate on the question of *onus probandi* and the mode of decision was not one contemplated in the Act, and was bad.

Semle: The right construction of the word "involved" is that it applies to the case rather than to the appeal which is to be certified under sub-section (i) (d), or admitted under sub-section (ii) of Section 40 of the Act, and includes points which may be raised by way of defence in an appeal.

But, *held*, that the Divisional Judge had acted with material irregularity, within the meaning of Section 622 of the Civil Procedure Code, inasmuch as (1) he had started a new ground of defence not pleaded by the defendant, *viz.*, that the agreement for separation between the defendant and his wife (the plaintiff) was obtained under pressure, and should not be enforced; (2) he had absolved the defendant from liability, although finding that defendant had committed a breach of the agreement from the beginning; (3) he had wrongly decided the question of *onus* of proof as regards breach of the terms of the agreement, and (4) he had dealt in generalities and conjectures about plaintiff's general bad conduct instead of giving definite findings on the evidence as regards specific misbehaviour on her part.

Although Hindu Law does not recognize divorce, the marriage tie being indissoluble, yet where the finding of a Court, in a suit by the wife for maintenance, would put an end to the plaintiff's conjugal rights, make her an outcast, and probably drive her into the streets for her livelihood, the evidence as to adultery and immorality on her part should be of a definite character as well as cogent and reliable, before the Court acts upon it for the purpose of dismissing her suit.

Section 622 of the Civil Procedure Code lays down the conditions under which the Court may revise the proceedings of subordinate Courts, and its powers of interference is subject to these conditions. But once the jurisdiction to revise is established on any of the grounds specified in the first part of the said section, there is no limitation imposed on the power of the Court as to the mode of disposal. The section is intended to arm the Court with the power of remedying injustice in cases not subject to appeal under certain specified circumstances, and, therefore, when the grounds of jurisdiction are established and a fit case shown for the exercise of its powers, there is nothing in the section to preclude the Court from finally disposing of the case itself because points of fact, and not points of law, are involved.

The Court finding that defendant had entirely failed to prove breach of the conditions of the agreement between him and plaintiff on the part of plaintiff, or that the latter had been guilty of any immorality, set aside the order of the Divisional Court, and restored the decree which plaintiff had obtained in the first Court

The references are to the Nos. given to the cases in the "Record."

No.

Husband and wife.—Custody of wife—Conduct of husband—Discretion of Court.—
In suits for the custody of the person of a wife, the Court requires from the husband proof not merely that he is the husband of the woman, but also that he has done nothing to forfeit his right to such special relief by failure in his own duty towards his wife. He has to show not only that he is not estopped from exercising a claim or privilege, but that he has done his duty in the matter towards his wife so as to entitle him to claim this extreme exercise of authority on his behalf.

Where it appeared that plaintiff's wife, of whom custody was sought, had some time previously absconded with another man, against whom plaintiff instituted criminal proceedings under Section 498 of the Penal Code, which he subsequently compromised by divorcing his wife, and that the defendant, R. S., thereafter married the said woman by *karewa*, held, that inasmuch as plaintiff had done all he could to divest himself of connection with, and responsibility for, his wife, the Court was not justified in putting in force the discretionary power vested in it and giving plaintiff a decree for the custody of his wife

75

I.

Illegal Purpose—Money paid for. See *Contract Act*, 1872, *Section 23*, No. 2.

Immoral Contract.—See *Contract Act*, 1872, *Section 23*, No. 1.

"Immovable Property" I *Suit for immovable property situate in different districts*
—*Joint suit by reversioners against person in wrongful possession.*—See *Cause of Action*.

" " *Pre-emption—Right to use water of perennial stream*—
" *"Immovable property."*—See *General Clauses Act*, 1868.

" " *Government ferry—"Immovable property"*—*Suit by lessee*
for recovery of tolls.—See *Small Cause Court Act*, 1887, *2nd Schedule*, *Article 13*.

Imprisonment in execution of decree.—See *Civil Procedure Code*, 1882, *Section 336*.

Improvements by mortgagees in Possession.—See *Mortgage*, No. 6.

Inequitable bargain.—See *Promissory Note*, No. 1.

Interest.—Construction of document—Provision in mortgage-deed regarding interest.
—In the case of a mortgage-deed in which there is a rate of interest fixed, without any specific condition that its payment shall cease on a certain contingency, and a clause specifying a date of redemption and conditional sale, it is generally to be held on a consideration of all the terms of the deed taken together, in the absence of clear intention to the contrary, that the contract does not contemplate the cessation of interest from the date when the payment of the capital sum becomes due.

When, therefore, a mortgage-deed provided that the mortgagor was to remain in possession, paying interest on the mortgage-money at 6 per cent. per annum half-yearly; that on default of payment of

The references are to the Nos. given to the cases in the "Record."

No.

interest compound interest was to be charged; that on default of payment of interest for four successive half-years, possession was to be given to the mortgage and the produce of the land was to be taken in lieu of interest; that the mortgaged property was to be redeemed within six years, and if not then redeemed, the mortgage was to become *ipso facto* a sale; and it appeared that there had been no breach of the condition regarding the failure to pay interest for four successive half-years previous to the end of the six years allowed for redemption, but that subsequently to the expiry of the said period, there had been a failure to pay interest for four successive half-years.

Held, that as there was no condition that interest should cease to run on the terms stated after the expiry of six years, defendant's failure to pay interest for four successive half-years after the expiry of the six years allowed for redemption was a clear breach of the terms of the contract and entitled plaintiff to obtain possession of the land as mortgagee, and that he was not bound to resort to the other relief, which he might have claimed, of foreclosure ... 77

J.

Joinder of Causes of Action.—See *Cause of Action*.

Joinder of parties.—*Pre-emption*—*Mortgage by conditional sale*—*Failure by pre-emptors to tender amount due on mortgage after notice, effect of*—*Plaintiff in pre-emption suit acting banami*—*Joint suit for pre-emption by numerous occupancy tenants*—*Price to be paid by pre-emptors on foreclosure of mortgage*—*Punjab Laws Act, 1872, Sections 13, 14, 15.*

Held, that in the case of a foreclosure of mortgage by conditional sale, the failure on the part of the pre-emptor to tender the amount due on the mortgage after notice duly served upon him, does not involve forfeiture of his right of pre-emption, the provision as to forfeiture contained in Section 14 of the Punjab Laws Act, which deals with sales, having been intentionally omitted in Section 15 of the Act which deals with foreclosures.

Held, further, that, though when it is proved that a plaintiff in a pre-emption suit is acting *banami* the Court should refuse the nominal plaintiff a decree, a plaintiff in such a suit is not disentitled to a decree merely because, in order to raise funds for the maintenance of his suit, he has entered into an agreement with other persons as to what he will do with the land if he gets it, any subsequent transfer of such land by the plaintiff after he has obtained it giving rise to a fresh cause of action to the other pre-emptors.

In a joint suit for pre-emption by several occupancy tenants and others it was objected on appeal that (1) the occupancy tenants had joined strangers in the plaint, (2) that plaintiffs were not the whole body of the occupancy tenants and (3) that as individual tenants they could not combine their claims in a single suit.

The references are to the Nos. given to the cases in the "Record."

No.

Held, that the said objections were unfounded. If the list of plaintiffs included any persons who were not occupancy tenants, the proper course was to take the objection at the first hearing and have their names struck out, which could be done without altering the plaint generally or affecting the right of the remaining plaintiffs to claim the whole property. Moreover, as it was not disputed that each occupancy tenant could sue separately for the whole property, or that the whole property would be divided equally among those tenants who succeeded in obtaining a decree, there was no reason why the plaintiffs could not sue jointly, even upon the assumption that they did not represent the whole body of the tenants.

As regards the price to be paid by the pre-emptor, *held*, that he was entitled to take the property on foreclosure on payment, not of what was due on the mortgage, but of the market value only.

The mere fact that a pre-emptor in his eagerness to get the land and to outbid others, had professed himself ready to pay a sum considerably more than the market value, *held*, not to amount to an estoppel, it being established that such statement did not lead defendant to confess judgment or to do any other act which he would not have done had the statement not been made

19

*Joinder of parties.—Joinder of parties.—Suit by representative of deceased mortgagee, who has obtained certificate under Act VII of 1889—Necessity of impleading mortgagee's other heirs—Act VII of 1889, Sections 4, 16.—*Plaintiff sued on the allegations that in 1883 defendant No. 1 mortgaged two houses to plaintiff's father for Rs. 2,000 and agreed to pay interest thereon at a specified rate, and the principal on demand; that plaintiff's father had died, and that plaintiff had obtained a certificate, under Act VII of 1889, for realisation of the debts due to the deceased, including the amount due on the said mortgage; that defendant No. 2 had purchased the said houses in execution sale with full knowledge of plaintiff's rights, and was now in possession thereof, and that defendant No. 1 despite demand had failed to pay the principal money or any interest since *Sambat* 1945. Plaintiff therefore prayed for recovery of a sum of Rs. 3,192 and costs, with a lien on the property mortgaged and recoverable by auction sale, and that defendant No. 1 be made personally liable for the amount of the decree and future interest. For defendants it was contended that the suit must fail by reason of the non-joinder as co-plaintiff of the deceased mortgagee's other son and co-heir, the latter being equally interested with plaintiff in the mortgage-deed.

Held, that inasmuch as, according to the authorities, the relief sought in the present suit could not have been granted in its entirety without a certificate under Act VII of 1889, the certificate-holder, who represented the estate *qua* the particular debt just as fully as an executor or administrator, was entitled to sue alone without impleading the other heirs of the deceased mortgagee

99

Judgment—Death of plaintiff before.—See Civil Procedure Code, 1882, Section 365.

Jurisdiction.—Suit for possession of immovable property situate in different districts.—See Cause of Action.

The references are to the Nos. given to the cases in the "Record."

No.

Jurisdiction.—Limitation Act, 1877, Section 14—"Defect of jurisdiction or other like cause."—See Limitation Act, 1877, Section 14.

" *Punjab Municipal Act, 1891, Sections 91, 92, 94, 95—Refusal of Municipal Committee to sanction re-erection of a projection—Discretion of Committee—Jurisdiction of Civil Court—Compensation.—See Municipal Committee.*

" *Punjab Courts Act, 1884, Sections 26, 75—"Business" and "functions" of District Court—Power of District Judge to assign function of trying a case to Additional District Court—Case in excess of pecuniary limits of latter Court's jurisdiction.—See Punjab Courts Act, 1884, Section 75.*

Jurisdiction of Civil or Revenue Court.—Landlord and tenant—Suit for possession by tenant who has been ejected—Suit instituted more than one year after ejection—Punjab Tenancy Act, 1887, Sections 50, 77 (3) (9)—Jurisdiction of Civil Court.—See Landlord and Tenant, No. 3.

" *Suit to set aside award of arbitrator appointed by Revenue Officer in partition proceedings—Allegation of fraud, but no dispute as to title—Punjab Land Revenue Act, 1887, Section 158 (2) (xvii) (xviii).—See Partition, No. 2.*

" *Partition—Right of widow who has succeeded to her husband's interests in joint holding to claim partition—Grant of such prayer by Revenue Officer—Jurisdiction of Civil Court to entertain subsequent suit by co-sharers objecting that widow is by custom not entitled to claim partition—"Question as to title"—"Owner" and "Landowner"—Punjab Land Revenue Act, 1887, Sections 111, 115, 116, 158.—See Partition, No. 3.*

Jurisdiction of Small Cause Court.—Suit by lessee of Government ferry for recovery of tolls.—See Small Cause Court Act, 1887, 2nd Schedule, Article 13.

K.

Khanadamadi—See Custom II—Alienation, No. 5.

L.

Landlord and Tenant.—Landlord and Tenant—Right of landlord to claim rent from sub-lessee—Attornment by sub-lessee to stranger claiming title to property—Termination of tenancy—Punjab Tenancy Act, 1887, Section 58.

Held, that upon the determination of a tenancy, it is the duty of the tenant not merely to relinquish possession of the premises, but to restore possession thereof to the landlord, and that if such tenant has underlet the whole or any portion of the premises, he will be liable for a breach of the obligation if his sub-tenant refuses or neglects to give up possession when the term ends.

An attornment made by a tenant or a sub-tenant to a stranger claiming title to the estate of the landlord is absolutely null and void, and the possession of such landlord is in no way affected or changed thereby.

The references are to the Nos. given to the cases in the "Record."

No.

Held, further, that there being no privity of contract between the original lessor and a sub-lessee, the former is not entitled to claim rent from the latter, his remedy being only against the lessee with whom he made the contract.

The provision in Section 58 of the Punjab Tenancy Act, 1887, is a special provision in a special enactment, and has no application to the ordinary law of landlord and tenant

14

Landlord and Tenant.—Monthly tenancy—Transfer of Property Act, Section 106—Tenant holding over—Damages.—Where a tenancy of certain shops was not for agricultural or manufacturing purposes, and the tenant failed to prove a contract for a lease from year to year, *held*, on the principal laid down in Section 106 of the Transfer of Property Act, that the tenancy was monthly, and that a notice of 15 days, terminating within a month of the tenancy, was valid.

Held, further, that the damages awardable by the Court against a monthly tenant who wilfully and contumaciously holds over, after notice, should be reasonable in amount

33

" " " " Landlord and Tenant—Suit by Tenant who has been ejected for possession—Suit instituted more than one year after ejection—Punjab Tenancy Act, 1887, Sections 50, 77 (3) (g)—Jurisdiction of Civil Court.

Held, that Section 50 of Punjab Tenancy Act, 1887, does not restrict the period of limitation allowed to a dispossessed occupancy tenant when suing for possession in the Civil Courts.

Where, therefore, plaintiffs who had been ejected from their occupancy holding in 1888, sued in the Civil Court long before the expiry of twelve years.

Held, that plaintiffs' suit was not barred by Section 50 of the said Act

64

" Landowner."—Partition—Right of widow who has succeeded to her husband's interests in joint holding to claim partition—Grant of such prayer by Revenue Officer—Jurisdiction of Civil Court to entertain subsequent suit by co-sharers objecting that widow is by custom not entitled to claim partition—"Question as to title"—"Owner" and "Landowner"—Punjab Land Revenue Act, 1887, Sections 111, 115, 116, 158.—See Partition No. 3.

" Pre-emption—Punjab Laws Act, 1872, Section 12—Landowner and landholder—Purchaser of small plot of unculturable land.—See Pre-emption, No.

" Land-suit."—Appeal—"Land suit"—Right in tank used for watering cattle and excavating earth to make bricks.—Plaintiff sued for declaration of right in a tank, valued at Rs. 900, which was used for watering cattle and excavating earth to make bricks.

Held, that, as these were not agricultural purposes or purposes subservient to agriculture, the tank was not "land" as defined in the Punjab Tenancy Act, and that, therefore, no further appeal lay ...

48

The references are to the Nos. given to the cases in the "Record."

No.

Legitimacy.—Custom.—Succession—Chaddar-andazi marriage, proof of—Legitimacy.—See Custom III—Inheritance, No. 4.

" *Custom.—Succession—Issue of woman whom a man could not legally marry, but treated by him as his wife.—See Custom III—Inheritance, No. 9.*

Lessee of Government ferry—Suit by, for recovery of tolls.—See Small Cause Court Act, 1887, 2nd Schedule, Article 13.

Lien.—See Partnership, No. 2.

Limitation Act, 1877.—Section 10.—Vested in trust—Suit for recovery of money misappropriated by Khazanchi of Native State—Suit based on void judgment of foreign Court—"Defect of jurisdiction or other like cause."—See Section 14, infra.

" " " *Section 14—Limitation Act, 1877, Sections 10, 14—"Vested in trust"—Suit for recovery of money misappropriated by Khazanchi of Native State—"Defect of jurisdiction or other like cause"—Suit based on void judgment of foreign Court.—Section 10 of the Limitation Act, 1877, has a limited application, and does not cover a suit brought against the *khazanchi* of a Native State to recover money said to have been misappropriated by him from the money in his charge, such money not being "vested in trust for any specific purpose," within the meaning of the said section.*

Neglect or laches of the plaintiff either in stating his case or prosecuting his suit is not "a defect of jurisdiction or other cause of a like nature," within the meaning of Section 14 of the said Act, and the inability of the Court to entertain the suit must arise from either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself, and unconnected with the acts of the parties.

Where, therefore, a plaintiff sued in a Court of competent jurisdiction, but based his suit on a foreign judgment which was a mere nullity, held, that he was not entitled to any deduction of time, under Section 14 of the Act, by reason of such suit

34

" " " *Section 18.—Pre-emption—Fraudulent concealment of sale—Limitation Act, 1877, Section 18, knowledge of facts, presumption as to.—In a suit for pre-emption it appeared that the deed of sale, which was described in two places in itself as a mortgage-deed, was dated 12th December 1876, and was registered on the same date at the *tahsil*, three or four miles from the village in which the land in suit was situate; that the marginal witnesses were residents of villages other than that in which the vendor and vendee resided, and where the land was situate; that from 1876 till 1895 the vendee continued to be recorded, as before, as tenant of the said land, that on the 19th September 1894, a measurement clerk reported that a sale had taken place, and that the vendee was in possession; that on the 1st October 1895 mutation of names was effected in the vendee's favour by order of the *Tahsildar*, and that the residents of the village in which the land was situate, as a body, were not aware of the sale. The plaint was filed in February 1896, concealment of the sale being therein alleged, and the*

The references are to the Nos. given to the cases in the "Record."

No.

pre-emptor, when examined before issues were framed, pleaded fraud by which he had been deceived. The first Court decreed the claim, finding that the fact of the sale became known to plaintiff on the 1st October 1895, and that there had been fraudulent concealment thereof, but the Divisional Judge, on appeal, dismissed the suit as barred by limitation, calculating either from the date of registration or from the 19th September 1894.

Plaintiff appealed to the Chief Court, and in addition to the facts above-mentioned, on which his allegation of fraudulent concealment was based, further urged in support of such allegation the fact that on the death of the vendor in 1881, his son was recorded as owner in his place.

Held, that though each of the facts above set forth when taken alone, might be merely suspicious, yet when found to concur, they established fraudulent concealment within the meaning of Section 19 of the Limitation Act.

Held, further, that fraudulent concealment having been established respondent upon whom the *onus* rested, had not proved that the appellant had knowledge of the sale more than one year before suit, which was therefore within time

12

Limitation Act, 1877—Section 26.—Easement—Right of way—Public or private road—"Question of law"—Limitation Act, 1877, Section 26.—User of road by public for less than 20 years.—Presumption as to dedication—English law.—The principles of the English law regarding the presumed dedication of a road to the public arising from user of such road by the public, being founded on reason and common-sense and conducive to public convenience, are applicable to India.

Held, therefore, that the user of a road by the public, openly and as of right, is sufficient, apart from the law laid down in the Limitation Act, 1877, Section 26, to raise a presumption of its dedication to their use, though such presumption might be rebutted by evidence of the owner's intention that the public should only have permissive user.

In the present case the evidence clearly showed that the road in dispute had been used as a public road for at least 10 years prior to suit, but the Divisional Judge, treating the case as one of prescription, found in favour of defendants because 20 years had not elapsed since the road was opened (Section 26 of the Limitation Act, 1877).

Held, under the circumstances as above set forth, that there was a presumption that the road had been dedicated to the use of the public and *found*, upon the evidence and facts of the case, that defendants had failed to rebut such presumption.

The right of the public to pass over a public road is not in the nature of an easement properly so-called, nor is it acquired by prescription under Section 26 of the Limitation Act, 1877.

A preliminary objection on behalf of defendants that there was no ground for admitting a further appeal in the case as there was no "question of law" involved, overruled on the grounds that the ques-

The references are to the Nos. given to the cases in the "Record."

No.

tions (a) whether plaintiff had not acquired a right of way over the road in dispute either by long user or grant; (b) whether the road came under the category of a public or a private road, involved consideration of points of law, and were not simple questions of fact.

Held, further, that the Divisional Judge's error in law in deciding the point under Section 26 of the Limitation Act, was of itself a sufficient ground for admitting a further appeal, though it was not the ground on which the appeal was admitted by the Judge in chambers

62

Limitation Act, 1877.—Second Schedule, Article 93.—Limitation Act, 1877, Second Schedule, Article 93—Suit for declaration that an alleged will was a forgery, and that testator had no power to make such will—Custom—Succession of daughter.—See Custom III—Inheritance, No. 2.

" " " " " " Article 141.—Mortgage by widow—Decree of foreclosure against widow—Regulation XVII of 1806—Regularity of proceedings, presumption as to—Suit by reversioners for recovery of land after death of widow—Limitation Act, 1877, Second Schedule, Article 141—Res judicata—Estoppel.

Held, that as against a person in possession of land under a title created by a widow, or in virtue of a decree for possession obtained against a widow, the reversioners have, under Article 141 of the Limitation Act, twelve years from the date of the widow's death within which they can sue for recovery of the land.

Held, further, that where a suit is brought against a female heiress in possession in respect of any matter which strikes at the root of her title to the property, a decree fairly and properly obtained against her binds all the reversioners, but, inasmuch as the widow's estate is ordinarily a limited one, and as she represents the reversioners only in special cases, in order that such decree should bind the latter, it must be shown, in the first instance, that the litigation was one in which the entire interest in the estate she held in possession was at stake, and then, that she had sufficiently protected the reversioner's interests, and that there was a fair and proper inquiry.

A widow's position with reference to the reversioners' interests is like that of a trustee, and any failure or neglect on her part to defend those interests in any such litigation render a decree obtained against her valueless against the reversioners.

Where certain mortgagees had, during the widow's lifetime, obtained a decree of foreclosure against her under Regulation XVII of 1806, *held*, that as against the reversioners, who sued for recovery of the land after the death of the widow, the *onus* of proving that the said foreclosure proceedings were in due form, and that the right of redemption was extinct, was on the mortgagees, there being no presumption in favour of the regularity and propriety of such proceedings.

A plea of estoppel by conduct, *held*, not established

29

" " " " " " Article 141—Limitation Act, 1877, Articles 141, 142—Adverse possession—Suit by reversioners on death of widow.—In a case in which it was proved that adverse possession had begun against a certain widow, in 1882, that the said widow died in 1883, and that her reversioners sued in 1895 for possession,

The references are to the Nos. given to the cases in the "Record."

No.

Held, that the reversioners' cause of action accrued on the death of the said widow, and that their suit, instituted within twelve years of that event, was within time.

Vundravandas v. Carsondas, I. L. R., XXI Bom., 646, approved ... 79

Limitation Act, 1877.—Second Schedule, Article 142.—See Article 141, supra. No. 2.

" " " " *Document, construction of—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership—Abandonment—Estoppel—Limitation Act, 1877, Second Schedule, Articles 142, 144.—See Registration Act, 1877, Section 17.*

" " " " " *Article 144.—Document, construction of—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership—Abandonment—Estoppel.—See Registration Act, 1877, Section 17.*

" " " " " *Article 179.—Civil Procedure Code, 1882, Section 108—Money paid into Court—Ex-parte decree upheld—Application by decree-holder for payment of deposit—Execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.—See Civil Procedure Code, 1882, Section 108.*

" " " " " *Article 179.—Execution of decree—Limitation—Civil Procedure Code, 1882, Sections 230, 235—Limitation Act, 1877, 2nd Schedule, Article 179 (iv).—See Civil Procedure Code, 1882, Section 230.*

" " " " " *Article 179—Pre-emption—Decree directing money to be paid into Court by certain date, but not stating consequences of non-compliance—Execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.—Where a decree in a suit for pre-emption directed that the sum for which pre-emption was decreed should be paid into Court by a certain date, but omitted to declare that if such sum was not paid on or before the said date, the suit should stand dismissed. Held, that such omission in the decree did not extend the time within which the plaintiff could pay the money, the plaintiff being bound, nevertheless, to pay the amount into Court within the time fixed.*

In such a case when the plaintiff failed to pay the amount into Court within the specified time,

Held, that the decree had become one incapable of execution, and was not governed by Article 179 of the Limitation Act, which only applies to decrees capable of execution 47

Lis pendens.—Lis pendens—Registered and unregistered deeds—Registration Act, 1877, Section 50.—Section 50 of the Registration Act, 1877, gives priority to registered documents of certain specified classes, as regards property comprised therein, over unregistered documents relating to the same property, not being decrees or orders, provided, in the latter case, that such decrees or orders are prior in point of date to the registered document.

Where, however, an unregistered mortgagee had already brought his suit to enforce his mortgage, *held*, that a mortgage, by registered deed, of the same property made during the litigation must, in accordance with the principles of *lis pendens*, be treated as subject to the result of the suit 32

The references are to the Nos. given to the cases in the "Record."

No.

Marriage.—Custom—Succession—Chaddarandazi marriage, proof of—Legitimacy. See Custom III.—Inheritance, No. 4.

" *Marriage of minor without consent of paternal relations—Respective rights of minor's husband and paternal uncle.—See Minor.*

" *Material Irregularity.*"—See *Revision in Civil Cases.*

Merger of Mortgage in sale.—See Mortgage, No. 7.

Minor.—See Guardian and Ward.

" " " " *Wards Act, 1890.—Hindu Law—Alienation.*

Custody of minor—Marriage of minor without consent of paternal relations—Respective rights of minor's husband and paternal uncle.—A minor girl, aged about 8 years, whose father was dead and whose mother could not be found, was given in marriage to respondent by her maternal grandmother without the consent of appellant, the minor's paternal uncle. The latter applied for the guardianship of the minor, but the District Judge dismissed his application on the ground that, if the marriage was unlawful by reason of the grandmother's incompetency to celebrate it, applicant was "at liberty to seek his remedy in a Civil Court."

Held, that the right of giving the minor in marriage lay with the appellant, and that even if a marriage had taken place between respondent and the minor, the respondent did not thereby acquire the right of guardianship when the paternal relations did not consent to the marriage 26

Misjoinder of Causes of Action.—See Cause of Action.

Misjoinder of Parties.—See Joinder of Parties.

Money paid to agent for unlawful purpose.—See Principal and Agent.

Monthly tenant holding over.—See Landlord and Tenant, No. 2.

Mortgage.—Adverse possession—Mortgagee in possession—Adverse possession as regards mortgagee, effect of, upon rights of mortgagor.—See Adverse Possession, No. 1.

" *Joinder of parties—Suit by representative of deceased mortgagee who has obtained certificate under Act VII of 1889—Necessity of impleading mortgagee's other heirs.—See Joinder of Parties, No. 2.*

" *Mortgage by widow—Decree of foreclosure against widow—Regulation XVII of 1806—Regularity of proceedings, presumption as to—Suit by reversioners after death of widow.—See Limitation Act, 1877, 2nd Schedule, Article, 141.*

" *Mortgage by conditional sale—Pre-emption—Failure by pre-emptor to tender amount due on mortgage after notice—Plaintiff in suit for pre-emption acting banami—Joint suit for pre-emption by several occupancy tenants—Sum payable by pre-emptors on foreclosure of mortgage.—See Pre-emption, No. 5.*

The references are to the Nos. given to the cases in the "Record."

No.

Mortgage.—*Mortgage-deed relating to immovable property—Deed compulsorily registrable, but registered in wrong Registry Office—Admissibility of deed in evidence—Fraud.*—See *Registration Act, 1877, Section 49.*

” *Mortgagor and mortgagee—Compensation for improvements by mortgagee, Regulation XVII of 1806.*—In 1872 plaintiff's father mortgaged a certain house to defendants' father and made over possession thereof to the latter. The mortgage-deed provided that the property should be redeemed within one year on payment of Rs. 900 principal and Rs. 7 on account of costs of a suit, the decree in which, in favour of defendants' father, formed the consideration for the mortgage. In default, it was provided that the mortgage should become a sale. The deed made no provision as regards the mortgagee's right to make repairs or improvements. The evidence established that the house at the time of mortgage was a *kacha* one, and that some seventeen years before suit it actually fell down owing to this cause, and was rebuilt by the mortgagee, without any objection on the part of plaintiff who was living in the neighbourhood, in a more substantial condition. Plaintiff having sued for redemption, defendants pleaded that the mortgage had under the terms of the deed become a sale, and that, in any event plaintiff could not redeem the property without paying for the improvements effected thereto. The lower Court decided against defendants on both points, and they appealed to the Divisional Court, but only on the ground that they were entitled to compensation. The Divisional Judge found that defendants were entitled to Rs. 429-10-0 as compensation out of the Rs. 1,200 claimed by them. On appeal to the Chief Court it was

Held, that the mortgagee had a right to rebuild the house in order to keep up his security, and in rebuilding it was authorised to make it more substantial, provided the work was done providently and without any unnecessary expense, and that the mortgagee was, therefore, entitled to be recouped for the outlay, which was under the circumstances a reasonable one, to the extent that the mortgagor would derive benefit therefrom.

Found, on the evidence, that the amount decreed by the Divisional Judge as compensation was proper and reasonable

” *Suit to contest validity of sale—Right of plaintiff's to attack mortgage made in favour of vendee more than 12 years before suit—Merger of mortgage in sale—Limitation Act, 1877.*—In a suit in which plaintiff prayed for a declaration that a certain sale of land would not affect his reversionary rights, and it appeared that the said land had been mortgaged to the subsequent vendee more than 12 years before suit,

Held, that there was nothing in the provisions of the Indian Limitation Act of 1877 which prevented the plaintiff in such suit from attacking the said previous mortgage, and that it could not be held in a suit regarding the subsequent sale, that the title of the mortgagee had acquired validity by prescription.

But, *held*, that there was a presumption, which had not been rebutted, that the mortgagee intended to keep alive the charge created by the previous mortgage-deed, and that it was not merged in the subsequent sale.

The references are to the Nos. given to the cases in the "Record."

No.

Held, therefore, that plaintiff was entitled to a declaration, that the sale would not affect his reversionary rights, but that such declaration could not affect the rights of the mortgagee under the previous mortgage 71

Mortgage.—Construction of document—Provision in mortgage-deed regarding interest.—In the case of a mortgage-deed in which there is a rate of interest fixed, without any specific condition that its payment shall cease on a certain contingency, and a clause specifying a date of redemption and conditional sale, it is generally to be held on a consideration of all the terms of the deed taken together, in the absence of clear intention to the contrary, that the contract does not contemplate the cessation of interest from the date when the payment of the capital sum becomes due.

Where, therefore, a mortgage-deed provided that the mortgagor was to remain in possession, paying interest on the mortgage-money at 6 per cent. per annum half-yearly; that on default of payment of interest compound interest was to be charged; that on default of payment of interest for four successive half-years, possession was to be given to the mortgagee and the produce of the land was to be taken in lieu of interest; that the mortgaged property was to be redeemed within six years, and if not then redeemed, the mortgage was to become *ipso facto* a sale; and it appeared that there had been no breach of the condition regarding the failure to pay interest for four successive half-years previous to the end of the six years allowed for redemption, but that subsequently to the expiry of the said period, there had been a failure to pay interest for four successive half-years,

Held, that as there was no condition that interest should cease to run on the terms stated after the expiry of six years, defendant's failure to pay interest for four successive half-years after the expiry of the six years allowed for redemption was a clear breach of the terms of the contract, and entitled plaintiff to obtain possession of the land as mortgagee, and that he was not bound to resort to the other relief, which he might have claimed, of foreclosure 77

Muhammadan Law.—Pre-emption—Death of claimant pendente lite—Abatement of suit—Punjab Laws Act, 1872, Section 5.—See Pre-emption, No. 12.

Municipal Committee.—See *Punjab Municipal Act, 1891, Section 45.—Punjab Municipal Act, 1891, Sections 91, 92, 94, 95—Refusal of Municipal Committee to sanction re-erection of a projection—Discretion of Committee—Jurisdiction of Civil Court—Compensation.*—Sections 92 and 150 of the Punjab Municipal Act, 1891, provide for the disposal of certain matters by a Municipal Committee and the Commissioner, and a Civil Court has no jurisdiction to interfere with the discharge of their powers and duties by either. But when it is alleged that action has been taken by the Committee *ultra vires*, or in bad faith, or which is not covered by the authority of the Act, the Court has the power to enquire into the matter, and if it finds that the action complained of is not covered by the powers given to such Committee under the Punjab Municipal Act, 1891, or any other Act, the Court can grant relief which in certain cases would take the form of an injunction.

The references are to the Nos. given to the cases in the "Record."

No.

In a case where a Municipal Committee refused to permit plaintiff to re-erect a certain construction which he had pulled down and wished to rebuild, except in accordance with the Committee's bye-law, whereupon plaintiff sued in Civil Court for a decree that the Committee had no right to interfere with his rebuilding, and that they should not so interfere.

Held, that whether or not plaintiff was entitled to rebuild the construction without the permission of the Committee (a point not before the Court), his right to do so was not indefeasible, but must come to an end as soon as the Committee chose to exercise their powers under Section 91 or Section 95 of the Act, a matter entirely within their discretion, and in which they were not liable to be controlled by the Civil Court, or, if so liable at all, only when they exercised their discretion in a capricious, wanton and oppressive manner

90

N.

Negligence on part of Guardian.—See *Guardian and Wards*.
Nuncupative Will.—See *Guardian and Wards Act*, No. 3.

O.

Oaths Act, 1873.—*Oaths Act*, 1873, *Section 11*—*Evidence given by person on oath, effect of, as regards person offering to be bound thereby*—*Civil Procedure Code*, 1882, *Section 562*.—Under Section 11 of the *Oaths Act*, 1873, the evidence given by a person on oath is, as regards the party who offered to be bound thereby, conclusive proof merely of the matter stated and of nothing further.

Where, therefore, in a suit by plaintiff for Rs. 550 profits lost by plaintiff through the default of N. C., and another, defendants, to deliver gram during one month at contract rate, and for Rs. 80 earnest-money paid to N. C., it appeared that one D. D., defendant, who made the contract as a broker and was alleged to have been a surety for its due performance, challenged N. C. to the oath, saying that if N. C. would swear that he (N. C.) had not received the earnest-money, he himself would be responsible for the plaintiff's claim, and the said N. C. thereupon swore that he had not received the said earnest-money, *held*, that such statement, on oath, merely concluded the question whether N. C. had or had not received such earnest-money.

Held, therefore, that the first Court had erred in regarding the oath so taken as *per se* sufficient ground for decreeing the suit as against D. D., and dismissing it as against the other defendants.

Held, further, that inasmuch as the first Court had decreed the suit merely on the oath taken, and had not decided any of the five issues which it had framed, the lower Appellate Court had rightly remanded the case under Section 562 of the *Civil Procedure Code*

45

Occupancy Rights.—*Occupancy rights, succession to*—*Adopted son*—*Punjab Tenancy Act*, 1887, *Sections 5, 59*—*Plea raised in Appellate Court for the first time*.

The references are to the Nos. given to the cases in the "Record."

No.

Held, that a daughter's son, who has been adopted, is not entitled, by virtue of clause (3) of Section 5 of the Punjab Tenancy Act, to succeed to the occupancy rights of his adoptive father who was a tenant under the said section, and that the objection to such succession can be taken by the male collaterals of the tenant as well as by the landlord.

The proviso in clause (3) of Section 5 of the Act refers only to the original acquisition of the right.

An Appellate Court is entitled to take notice of a question of law which clearly arises in the case, even though the question may have been overlooked both by the parties to the case and by the Courts which have dealt with it 22

Occupancy Rights—Occupancy rights—Alienation by widow in favour of proprietor—Right of reversioner to object—Punjab Tenancy Act, 1887, Section 59 (3).

Held, that a mortgage of occupancy rights by a widow is void under Section 59 (3) of the Punjab Tenancy Act, 1887, and none the less so because such mortgage is in favour of some of the proprietary body.

Held, also, that plaintiff, as the reversionary heir to the widow and a co-sharer with her in the holding which was undivided, was entitled to sue for a declaration that such mortgage was void 39

„ „ *Punjab Tenancy Act, 1887, Sections 53, 56, 60—Unauthorized alienation of occupancy rights—Customary right of collaterals to object to alienation.*

Held, by the Full Bench, that when an occupancy tenant has not complied with the provisions of Sections 53 and 56 of the Tenancy Act, 1887, by giving notice to the landlord of his intention to alienate, or obtaining the landlord's previous consent in writing, the alienee obtains no indefeasible title to the tenancy under the Act, such alienation being voidable under Section 60 of the Act at the instance of the landlord, or by a collateral under customary law if the collateral is able to establish the custom.

In considering whether such custom exists the Court may take into consideration the custom applicable as regards alienations of proprietary rights, a very strong inference arising from the existence of the custom in the latter case that it exists also in the former case ... 89

“*Omnia rite esse acta.*”—See *Limitation Act, 1877, 2nd Schedule, Article 141.*

“*Owner*” and “*Landowner.*”—See *Partition, No. 3.—Pre-emption, No. 11.*

P.

Fagwand or Chundawand.—See *Custom III—Inheritance, No. 7.*

Parties—joinder of.—See *Joinder of Parties.*

Partition.—*Civil Procedure Code, 1882, Section 43—Application to Revenue Officer for partition of land—Question of title decided by said officer—Subsequent suit for possession of house—Title to land and house identical—Punjab Land Revenue Act, 1887, Section 117.*—In previous partition proceedings, relating to certain land and between the parties to the present

The references are to the Nos. given to the cases in the "Record."

No.

suit the Revenue Officer, before whom the proceedings were instituted, passed an order under Section 117 of the Land Revenue Act, to the effect that he would himself inquire into and determine the question of title that had been raised. Subsequently the present plaintiffs filed an application, upon which they paid the full stamp necessary for a civil suit, but which was not in the form of, or verified as, a plaint, and contained no statement of claim beyond a reference to the said order, and a statement that a separate suit would be brought for possession of a house connected with the land. The application was, however, registered in the register of civil suits, the order that it should be so registered and the summons issued being signed by the said officer, who was an Extra Assistant Commissioner, as "Munsif, 1st class." The officer then proceeded under Section 117 (2) (b) of the Land Revenue Act, and gave plaintiff a decree in respect of the land, the judgment being signed by him as "Assistant Collector," and the decree as "Munsif, 1st class." Plaintiffs having subsequently sued for possession of the house mentioned in their said application, defendants pleaded that the suit was barred under Section 43 of the Civil Procedure Code, on the ground that the decree in the partition proceedings had been passed by the Extra Assistant Commissioner, purely in the exercise of his civil powers as a Munsif, 1st class, and that therefore the claim to the house could have been made before him and determined in those proceedings. It was admitted that plaintiff's title to the land and to the house was the same.

Held, that the Extra Assistant Commissioner had clearly intended in the partition proceedings to act under Section 117 (2) (b) of the Land Revenue Act, as a Revenue Officer, and that his jurisdiction was confined to the question of title to the land which alone was the subject of those proceedings.

Held, therefore, that inasmuch as no claim to the house could have been included in the former proceedings, the present suit was not barred under Section 43 of the Civil Procedure Code

30

Partition.—*Punjab Land Revenue Act, 1887, Section 158 (2) (xvii), (xviii)*—*Suit to set aside award of arbitrators appointed by Revenue Officer in partition proceedings—Allegation of fraud, but no dispute as to title.*—Plaintiffs sued to set aside an award of arbitrators appointed by a Revenue Officer, under Chapter X of the Punjab Land Revenue Act, 1887, in a dispute between the parties about partition of land. No question as to title was raised, but plaintiffs sued on the ground of fraud inasmuch as they had not been given the land which had been promised to them.

Held, that the suit would not lie, plaintiffs' only course being to press their objections before the Revenue Officer, and thereafter appeal to the superior Revenue authority

52

" **Partition**—*Right of widow who has succeeded to her husband's interests in joint holding to claim partition—Grant of such prayer by Revenue Officer—Jurisdiction of Civil Court to entertain subsequent suit by co-sharers objecting that widow is by custom not entitled to claim partition—"Question as to title"—"Owner" and "Landowner"—Punjab Land Revenue Act, 1887, Sections 111, 115, 116, 158.*

The references are to the Nos. given to the cases in the "Record."

No.

Held, by the Full Bench, that though a widow who succeeds to her husband's interests in a joint holding on a life tenure and is recorded as a joint-owner in the Revenue papers, is entitled, as being "an owner" within the meaning of Section 111 of the Punjab Land Revenue Act, 1887, to apply for partition before a Revenue Officer, who has a discretion to either grant or refuse her prayer, it is open to the co-sharers, in the event of her prayer being so granted, to seek relief in the Civil Court on the ground that the widow was by custom not entitled to claim partition, such objection on their part raising a question of title in the land sought to be partitioned and therefore giving the Civil Court jurisdiction to entertain the suit

82

Partnership.—Document, construction of—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership—Abandonment—Estoppel—Limitation Act, 1877, 2nd Schedule, Articles 142, 144.—Plaintiff sued for an account of the income and expenditure of a certain *kul* (or water-course) jointly excavated by the parties under an agreement in writing, dated 24th February 1873, whereby it was agreed, *inter alia*, that, in consideration of half the outlay in excavating the *kul*, which originally belonged to defendant and his ancestors, but had fallen into disrepair and become useless, the plaintiff was to become a half-sharer therein; that thenceforth the income and expenditure on the *kul* was to be shared in the same proportion, and that in the event of a sharer failing to pay the expenses of repairs, he was to be debarred from participating in the income of that year. Defendants admitted the agreement and rendition of accounts till 1936 Sambat, but alleged that after that year the *kul* was stopped and litigation ensued with the owners of certain villages; that plaintiff refused to contribute towards the expenses and gave up his share; and that defendants had conducted the cases themselves and enjoyed the profits of the *kul* ever since.

The District Judge dismissed the suit on the ground that plaintiff, by refusing to contribute towards the expenses of the said litigation and by his subsequent conduct, had abandoned and lost his rights in the *kul*. This decree was upheld, on appeal, by the Divisional Judge, both on the ground that plaintiff had abandoned and lost his said rights, and also that his conduct estopped him from preferring the present claim.

Plaintiff having appealed to the Chief Court, the defendants supported the decree of the lower Courts, not only on the ground of abandonment and estoppel, but also on the grounds (a) that plaintiff's rights in the *kul* could not be proved, as the written agreement of 1873 required registration, and being unregistered was inadmissible in evidence; (b) that the suit was practically one for accounts of a partnership, and therefore could not lie without a prayer for dissolution; and (c) that the failure of plaintiff to contribute towards the expenses of repairs debarred him from claiming a share of the produce for any of the years for which accounts were claimed.

Held, that the claim was one relating to profits of immovable property, and that the right in respect of which the parties were litigating and which formed the basis of the claim was one regarding such property, and that, therefore, the limitation for the possession of a share in the *kul* would be 12 years, whether under Article 142 or Article 144 of the Limitation Act.

The references are to the Nos. given to the cases in the "Record."

No.

Found, upon the evidence, that there was no proof of abandonment on the part of plaintiff.

Held, futher, that the written agreement of 1873 did not require registration, inasmuch as taken as a whole, it meant nothing more than that defendant agreed to give plaintiff a half share in the *kul* provided that the latter paid a half share of the expenses of excavation, and that such a condition did not create a present right in the *kul*, but merely one that would come into existence in the event of plaintiff fulfilling the said condition.

Held, also, that even if it were conceded that a present right was created by the instrument it was only a right in the ruined *kul*, which had at the time no value at all, and certainly could not be said to have been worth Rs. 100, and that the valuable property which might come into existence if the conditions of the agreement were carried out could not be held to furnish the test of valuation.

Section 17 of the Registration Act must be strictly construed, and unless a document is clearly brought within the purview of the section, it cannot be excluded from evidence, and, in case of doubt, the benefit must be given to the document.

Held, upon the facts of the case, that the claim was one for accounts of a co-ownership in immoveable property and not of a partnership.

Held, finally, that the agreement, rightly construed, only deprived a co-sharer of the income in case he refused to pay his quota of expenses of repairs, &c., and that mere non-payment did not amount to such refusal, though defendant was entitled to deduct the amount of the said expenses from plaintiff's share of the profits

51

Partnership—Lien—Contract Act, 1872, Sections 60, 61, 217, 262—Set off—Civil Procedure Code, 1882, Section 111.—The rule as to the equitable lien possessed by each partner on the partnership property cannot be applied so as to enable a managing partner to appropriate money due to another partner out of the assets of a firm in liquidation of a debt due from that partner to himself and entirely unconnected with the business of the firm.

Neither at common law nor in equity is there any right of set-off between parties mutually indebted in the absence of an agreement to that effect. Nor do the provisions of Section 111 of the Civil Procedure Code apply where the debt sought to be set-off was barred by limitation before the suit was filed

53

Perversion to Muhammadanism.—See *Custom I.—Adoption*, No. 2.

Plaint.—*Order of Appellate Court returning plaint for amendment—Appeal.*—See *Civil Procedure Code, 1882, Section 588 (b).*

Plaintiff, death of.—See *Civil Procedure Code, 1882, Section 365.—Pre-emption*, No. 12.

Pleader, power of, to compromise suit.—See *Civil Procedure Code, 1882, Section 375.*

Possession, suit for, by tenant after ejectment.—See *Landlord and Tenant*, No. 3.

The references are to the Nos. given to the cases in the "Record."

No.

Pre-emption.—Civil Procedure Code, 1882, Section 244—Decree for pre-emption—Question whether decree-holder has paid money into Court within time.—See Civil Procedure Code, 1882, Section 244.

" *Pre-emption—Fraudulent concealment of sale—Limitation Act, 1877, Section 18, knowledge of facts, presumption as to.—See Limitation Act, 1877, Section 18.*

" *Pre-emption—Decree directing money to be paid into Court by certain date, but not stating consequences of non-compliance—Execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.—See Limitation Act, 1877, 2nd Schedule, Article 179, No. 3.*

" *Pre-emption—Punjab Laws Act, 1872, Section 9—Rights to use water of perennial stream—"Immovable property"—General Clauses Act, 1868, Section 2 (5).*

Held, that inasmuch as the water of a perennial stream comes out of land, the right to use such water is "a benefit arising out of land," and is, therefore, "immovable property" within the meaning of Section 2 (5) of the General Clauses Act, 1868, so as to found a suit for pre-emption in respect of a sale thereof under Section 9 of the Punjab Laws Act, 1872 11

" *Pre-emption—Mortgage by conditional sale—Failure by pre-emptors to tender amount due on mortgage after notice, effect of—Plaintiff in pre-emption suit acting banami—Joint suit for pre-emption by numerous occupancy tenants—Price to be paid by pre-emptors on foreclosure of mortgage—Punjab Laws Act, 1872, Sections 13, 14, 15.*

Held, that in the case of a foreclosure of mortgage by conditional sale, the failure on the part of the pre-emptor to tender the amount due on the mortgage after notice duly served upon him, does not involve forfeiture of his right of pre-emption, the provision as to forfeiture contained in Section 14 of the Punjab Laws Act, which deals with sales, having been intentionally omitted in Section 15 of the Act, which deals with foreclosures.

Held, further, that, though when it is proved that a plaintiff in a pre-emption suit is acting *banami* the Court should refuse the nominal plaintiff a decree, a plaintiff in such a suit is not disentitled to a decree merely because, in order to raise funds for the maintenance of his suit, he has entered into an agreement with other persons as to what he will do with the land if he gets it, any subsequent transfer of such land by the plaintiff after he has obtained it giving rise to a fresh cause of action to the other pre-emptors.

In a joint suit for pre-emption by several occupancy tenants and others it was objected on appeal that (1) the occupancy tenants had joined strangers in the plaint, (2) that plaintiffs were not the whole body of the occupancy tenants, and (3) that as individual tenants they could not combine their claims in a single suit.

Held, that the said objections were unfounded. If the list of plaintiffs included any persons who were not occupancy tenants, the proper course was to take the objection at the first hearing and have their names struck out, which could be done without altering the plaint

The references are to the Nos. given to the cases in the "Record."

No.

generally or affecting the right of the remaining plaintiffs to claim the whole property. Moreover, as it was not disputed that each occupancy tenant could sue separately for the whole property, or that the whole property would be divided equally among those tenants who succeeded in obtaining a decree, there was no reason why the plaintiffs could not sue jointly, even upon the assumption that they did not represent the whole body of the tenants.

As regards the price to be paid by the pre-emptor, *held*, that he was entitled to take the property on foreclosure on payment, not of what was due on the mortgage, but of the market value only.

The mere fact that a pre-emptor in his eagerness to get the land and to outbid others, had professed himself ready to pay a sum considerably more than the market value, *held*, not to amount to an estoppel, it being established that such statement did not lead defendant to confess judgment or to do any other act which he would not have done had the statement not been made

19

Pre-emption.—*Pre-emption, suit for—Sale or contract to sell—Construction of document—Transfer of Property Act, 1882, Section 54.*—According to the terms of a certain deed, which was stamped with a one-rupee stamp, the vendor undertook to satisfy plaintiff further as to the vendor's title, and to execute a deed of sale within three months, after which, if such deed was not executed, plaintiff might sue for specific performance. The amount of the purchase-money was Rs. 15,000, of which Rs. 4,300 was proved to have been paid in cash to the vendor.

Held, that the deed, rightly construed, amounted merely to a contract to sell and not a sale, and that the payment of consideration did not necessarily imply that the deed was a sale.

Held, further, that, under Section 54 of the Transfer of Property Act, 1882, which, though not in force in the Punjab, represents generally the law in force in British India, a contract for sale of immovable property does not of itself create any interest in, or charge upon, such property

65

.. **Pre-emption—Sale to two co-sharers and a stranger—Subsequent acquisition of stranger's share by third co-sharer—Suit by a fourth co-sharer for pre-emption.**—The land in suit was in the first instance sold to three persons, of whom two were co-sharers in the joint holding, but one was not. Subsequently plaintiff, who was also a co-sharer in the said holding, sued for pre-emption in respect of the sale, but shortly before the institution of his suit, the stranger vendee sold his share to one K. C., another co-sharer in the same holding. Accordingly at the time when the suit was instituted, the land was in the hands of three vendees against no one of whom plaintiff could assert a superior right. It was, however, contended on behalf of plaintiff that regard must be had to the original transaction in which two vendees, who had equal rights with plaintiff, had joined with them in the purchase a third whose right was inferior to that of plaintiff, and that the right of pre-emption which plaintiff would in consequence have had as against the original vendees could not be defeated by the subsequent elimination of the stranger and the substitution of a person against whom plaintiff had not a superior right.

The references are to the Nos. given to the cases in the "Record."

No.

Held, overruling the said contention, that the mere fact that at one stage a stranger had a share in the bargain could not be held to vitiate the right of the three persons who were the vendees at the date of suit and resisted plaintiff's claim with one that was not inferior to his own 69

Pre-emption.—Pre-emption—Claim in respect of land situate in out-growth of town of Batala and occupied by shops—Onus probandi.—Plaintiff sued for pre-emption of certain land which, though formerly agricultural, was at the date of suit situate in an out-growth of the town of Batala, and was occupied by business premises, or shops, and not by dwelling-houses.

Held, that the claim must be treated as one in respect of property which, though formerly agricultural land, should now be regarded as subject to urban rules.

Held, therefore, that the burden of proving that there was a custom of pre-emption applicable to such property was upon plaintiff, and found, that plaintiff had failed to relieve himself of such *onus*.

No. 87, *Punjab Record*, 1890, followed 70

„ „ *Pre-emption—Parties with equal rights of pre-emption—Liability of party who privately purchases from original vendor to be defeated by party who subsequently to such purchase sues original vendor and vendee for pre-emption.—A*, having sold certain property, in respect of which X and Y had equal rights of pre-emption, to B, X privately purchased the said property from B. Subsequently to such re-sale, Y sued A and B for pre-emption.

Held, that X by his purchase from B had asserted his pre-emptive title in so efficacious a form as to be entitled to have his bargain secured to him against every one not having a superior right of pre-emption.

No. 138, *Punjab Record*, 1884, and *I. L. R.*, XX¹/₄ All., 100, followed... 73

„ „ *Pre-emption—Conditional decree—Payment of purchase-money—Appeal—Decree of Appellate Court confirming decree of first Court, but silent as to time for payment of purchase-money.—The first Court granted plaintiff a decree for possession of certain land on payment by him of Rs. 300 within one month from the date of decree. Plaintiff appealed to the lower Appellate Court on the question of price and costs. The lower Appellate Court dismissed the appeal and concluded its judgment as follows: "I observe that plaintiff admits not having paid "Rs. 300 into Court as directed by the 16th April 1898. This should "be taken into account by the lower Court in the event of plaintiff now "desiring to pay in the money. I have not thought it right to extend "in any way the time within which the plaintiff should have liberty "to deposit his money." Forty-eight days after the date of the latter decree plaintiff filed an application for revision in the Chief Court, but did not deposit the said purchase-money or any part thereof.*

The references are to the Nos. given to the cases in the "Record."

No.

Held, following *Rup Chand v. Shams-ul-Jahan* (I. L. R., XI All., 346), that inasmuch as the decree of the first Court had allowed one month for payment of the purchase-money, and the appeal against that decree had been dismissed without any fresh period for payment being expressly allowed, the Appellate decree must be taken to have incorporated the terms of the original decree, that the period of one month allowed for payment must be calculated from the date of the Appellate decree, and that payment by the decree-holder within one month of that date would have been in time.

Under the circumstances of the present case, the Chief Court granted the decree-holder a further period of 14 days from the date of its order for such payment 88

Pre-emption.—*Pre-emption, Act IV, of 1872, Section 12*—"Landowner" and "Landholder"—*Purchase of small plot of unculturable land.*—Plaintiff, one of the old proprietary body with a large holding, claimed possession by pre-emption of certain land which had been sold by one M. to defendants by registered deed of sale. Defendants admitted plaintiff's right to pre-empt, but pleaded that their rights of pre-emption were equal as they also owned land in the same *taraf* as the land in question. It appeared that defendants owned 1 *kanal* $1\frac{1}{2}$ *marlas* of land *ghair-mumkin chappar*, that is unculturable pond, which they purchased for Rs. 200. The point for decision was whether the possession of this plot of unculturable land constituted defendants *vendees* "landowners or landholders" within the meaning of Section 12 (d) of Act IV of 1872.

Held, that defendants were not "landowners" or "landholders" within the meaning of the said section so as to be entitled to a right of pre-emption equal to that of plaintiff.

No. 153, *Punjab Record*, 1888, followed; No. 7, *Punjab Record*, 1896, distinguished 96

" *Pre-emption—Death of claimant pendente lite—Abatement of suit—Muhammadan Law—Punjab Laws Act, 1872, Section 5.*—The plaintiff in a suit for pre-emption died *pendente lite*, whereupon his sons were brought on the record and obtained a decree. On appeal the Divisional Judge *proprio motu* dismissed the suit on the ground that by Muhammadan Law, which was the personal law of the parties, the death of a person who claimed pre-emption caused the abatement of the suit.

Held, that under Section 5 of the Punjab Laws Act, 1872, Muhammadan Law, even though the parties were Muhammadans, was inapplicable to a claim for pre-emption in respect of agricultural land, and that a suit for pre-emption brought by a landowner respecting village lands should not be regarded as a merely personal action which must terminate on the death of the original plaintiff, and does not survive to his representatives 98

Presumptions.—*Presumption as to dedication of road to public.*—See *Limitation Act 1877, Section 26.*

" *Presumption as to regularity of proceedings.*—See *Limitation Act, 1877, 2nd Schedule, Article 141, No. 1.*

The references are to the Nos. given to the cases in the "Record."

No.

Principal and Agent.—*Suit for recovery of money paid to agent for unlawful purpose—Suit instituted before execution of unlawful object—Principal and agent—Contract Act, 1872, Section 23—Locus penitentiae.*—Plaintiff sued on the allegations that he paid a sum of Rs. 300 to the defendant, a friend of his, to procure him a bride; that defendant had represented that this sum was to be paid to the bride's father in advance, and the betrothal performed on the 9th Nauratra; that no betrothal had taken place, and that defendant on being asked to refund had denied the receipt of the money. Defendant denied the transaction altogether. The first Court found that plaintiff's allegations were proved, and that he was entitled to recover, but the Divisional Judge on appeal held that the defendant had undertaken to act as a mere procurer, that the contract was opposed to morality and public policy, and following No. 116, *Punjab Record*, 1880, dismissed the suit without going into the facts. Plaintiff appealed to the Chief Court.

Held, that inasmuch as, upon the true construction of the transaction defendant was merely a go-between or agent of the plaintiff for paying the money to the bride's father, the property in the money did not pass to the defendant, but remained with the plaintiff so long as it continued in defendant's hands or until it was paid over to the father of the intended bride.

Held, therefore, that the suit was maintainable.

A person who pays money to his agent, whether on the agent's representation or of his own motion, for an unlawful purpose is entitled to a *locus penitentiae*, and can call back his money at any time before the purpose is executed, nor in such a case can the agent, merely because he was entrusted with an unlawful commission, repudiate his liability to refund and appropriate the money to his own use.

I. L. R., XXIII Calc., 962; *I. L. R.*, XVIII Mad., 388; No. 106, *Punjab Record*, 1879; No. 50, *Punjab Record*, 1880; No. 116, *Punjab Record*, 1880; No. 128, *Punjab Record*, 1889:—*Taylor v. Bowers* (*L. R. I.*, Q. B. D., 291) and *Kearley v. Thomson* (*L. R.*, XXIV, Q. B. D., 747), referred to

63

Promissory Note.—*Consideration—Inequitable bargain—Burden of proof.*—In a suit by plaintiff to recover from defendant No. 1 and his wife a sum of Rs. 10,000 principal and Rs. 2,400 interest on a promissory note purporting to be executed by both defendants on the 29th November 1895, payable six months after date, defendant No. 1 while admitting execution, pleaded that after he had attained majority his extravagance had necessitated his estate being again put under the Court of Wards; that after the time the debt was contracted he was living on a small monthly allowance of Rs. 160, which was inadequate for his wants; that he cast about for a loan, and that plaintiff, whom he described as an astute lawyer's clerk, caught him in his meshes and got him to execute the note for a grossly inadequate consideration. It was, therefore, urged on his behalf that the doctrine of the English Court of Chancery in the case of expectant heirs and necessitous persons should be applied, and a decree passed merely for what he had actually received, with reasonable interest thereon.

The references are to the Nos. given to the cases in the "Record."

No.

It appeared that defendant No. 1 was a well grown and mature man of about thirty, who had already succeeded to a large estate, and that, though addicted to extravagance and debauchery, he was not a person of weak mental capacity, or in any state of mental or bodily distress, or such necessity as made him incapable of weighing the consequences of the transaction into which he was entering with the plaintiff with whom he had had no previous dealings.

Held, that under the above circumstances defendant No. 1 could not be placed in the category of those incapable of protecting themselves, and that the case must, therefore, be treated as an ordinary case of debtor and creditor, the *onus* of proof of all the disputed facts being, on the pleadings, upon defendant No. 1.

Held, further, that there is an equity founded upon the gross inadequacy of consideration, but it can only be when the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition.

Found, upon the evidence, that defendant No. 1 had failed to prove his allegations.

A plea by defendant No. 2 that she had never executed the promissory note or put her mark on it, or received consideration in respect thereof, *found*, not established

60

Promissory Note.—*Document, construction of—Promissory Note or acknowledgment of liability—Suit based on document stamped with anna-stamp—Admissibility of document in evidence—Right of plaintiff to fall back on original consideration—Evidence Act, 1872, Section 91—Stamp Act, 1879, Section 34.*—Plaintiff in his plaint alleged that "on the 17th June 1897 defendant raised Rs. 500, cash, at Lahore, and wrote the promissory note. He agreed to repay the money by monthly instalments of Rs. 100, and further agreed to pay Re. 1 per cent. per mensem as interest," that demand for payment had been made, and that the cause of action arose on the expiry of the period for the payment of each instalment, the suit being filed on the 14th October 1897 for three instalments and interest as above stated. The document referred to had affixed to it an anna-stamp, and was in the following terms:—"Received from Mr. E. G., Superintendent, Punjab Dairy, the sum of Rs. 500 only, as advance, repayable by instalments of one hundred per month, and to bear interest at Rs. 12 per cent.—17th June 1897." It was signed by the defendant.

The first Court dismissed the suit on the ground that the document upon which it was based was a promissory note, payable otherwise than on demand, and, being insufficiently stamped as such, could not, under Section 34 of the Stamp Act, 1879, be admitted in evidence for any purpose, even on payment of a penalty, in a civil suit. Plaintiff applied for revision of this order, and it was contended on his behalf that the document bore a dual character, as a promissory note and as an admission of liability, and was admissible in evidence as an acknowledgment. It was further contended that the Rs. 500 were made up of advances for milk made at various times, and that plaintiff was in any event entitled to fall back upon the original consideration of the contract,

The references are to the Nos. given to the cases in the "Record."

No.

Held, that the document upon which plaintiff based his suit was a promissory note, payable otherwise than on demand, and being insufficiently stamped as such could not, under Section 34 of the Stamp Act, be received in evidence or acted upon in a civil suit.

Held, further, that plaintiff was not entitled to aver against his plaint or to amend his plaint in such a manner as to sue on the original consideration.

Held, also, that from the frame of the suit it was clear that the document sued on embodied the contract between plaintiff and defendant, and was the contract out of which defendant's liability arose, and that under Section 91 of the Evidence Act, the document was the best evidence of the contract, and no other evidence of the terms thereof could be given

92

Proprietary body of village.—Right of proprietary body to contest alienation by widow of a childless proprietor.—See Custom II—Alienation, No. 4.

" " " Custom—Succession—Exclusion of collaterals by proprietors of village.—See Custom III—Inheritance, Nos. 6 and 8.

Public, Dedication of road to.—See Limitation Act, 1877, Section 26.

Punjab Courts Act, 1884.—Section 26.

See Section 75, infra.

" " " Section 40.—"Question of law involved"—Burden of proof.—See Burden of Proof, Nos. 5 and 6.

" " " Section 67—Punjab Courts Act, 1884, Section 67—Hearing fixed for gazetted holiday—Obligation of party to appear on such day.—Proceedings held in a Civil Court on a holiday are not necessarily a nullity on that account, but if the Court wishes to hear a case on a gazetted civil holiday, it must do so with the consent of the parties concerned, and cannot make them appear before itself without such consent, the exemption from attendance in Court on a gazetted holiday being a privilege conferred by law, of which no Court can of its own motion deprive the person concerned in the absence of any waiver of such privilege on the part of the latter. Nor in this respect is there any distinction between one class of gazetted holidays and another class

55

" " " Section 75.—Punjab Courts Act, 1884 Sections 26, 75—"Business" and "functions" of District Court—Power of District Judge to assign function of trying a case to Additional District Court—Case in excess of pecuniary limits of latter Court's jurisdiction.—Section 75 of the Punjab Courts Act must be construed in consonance with Section 26 of the Act, and it is therefore not competent to a District Judge by any act of his under sub-section (2) of Section 75 to extend the powers conferred on Judicial Officers by the Local Government under Section 26.

The "business in the Court of the District Judge" spoken of in Section 75 (1) of the Act means business it has to dispose of as the District Court, and the "functions" mentioned in sub-section (2)

The references are to the Nos. given to the cases in the "Record."

	No.
of the said section are functions proper to such Court, and must be such as a Sub-Judge of the highest class is unable to discharge, and do not mean the mere trial of civil suits of the value of over Rs. 5,000	46
<i>Punjab Land Revenue Act, 1887.—Section 111.—See Partition, No. 3.</i>	
" " " <i>Section 115.—See Partition, No. 3.</i>	
" " " <i>Section 116.—See Partition, No. 3.</i>	
" " " <i>Section 117.—See Partition, No. 1.</i>	
" " " <i>Section 158.—See Partition, Nos. 2 and 3.</i>	
<i>Punjab Laws Act, 1872.—Section 5.—See Pre-emption, No. 12.</i>	
" " <i>Section 9.—See Pre-emption, No. 4.</i>	
" " <i>Section 12.—See Pre-emption, No. 11.</i>	
" " <i>Sections 13, 14, 15.—See Pre-emption, No. 5.</i>	
<i>Punjab Municipal Act, 1891.—Section 2.—See Section 45, infra.</i>	
" " <i>Section 45.—Punjab Municipal Act, 1891, Sections 2 (2), 45 (8) (c)—Tax leviable by the year.</i>	
<i>Held, that in a Municipality governed by Act XX of 1891, a tax leviable by the year is, under Section 45 (8), proviso (c), leviable by the calendar year from the 1st January to the 31st December, and that the said proviso relates equally to taxes which were imposed before the said Act came into force, and which had hitherto been levied by the financial year from the 1st April to the 31st March ...</i>	4
<i>Sections 91, 92, 94, 95.—See Municipal Committee.</i>	
<i>Punjab Tenancy Act, 1887.—Section 50.—See Landlord and Tenant, No. 3.</i>	
" " <i>Section 53.—See Occupancy Rights, No. 3.</i>	
" " <i>Section 56.—See Occupancy Rights, No. 3.</i>	
" " <i>Section 58.—See Landlord and Tenant, No. 1.</i>	
" " <i>Section 59.—See Occupancy Rights, Nos. 1 and 2.</i>	
" " <i>Section 60.—See Occupancy Rights, No. 3.</i>	
" " <i>Section 77.—See Landlord and Tenant, No. 3.</i>	

Q.

"Question of Law."—See *Burden of Proof*, Nos. 5 and 6, *Easement*.

"Question as to Title."—See *Partition*, Nos. 2, 3 and 4.

R.

Reciprocal Promises.—See *Contract Act, 1872, Section 52*.

Recovery of money paid to agent for unlawful purpose.—See *Principal and Agent*.

Registration Act, 1877.—Section 17.—Document, construction of—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership—Abandonment—Estoppel—Limitation Act, 1877, 2nd Schedule, Articles 142, 144.—

The references are to the Nos. given to the cases in the "Record."

No.

Plaintiffs sued for an account of the income and expenditure of a certain *kul* (or water-course) jointly excavated by the parties under an agreement in writing, dated 24th February 1873, whereby it was agreed, *inter alia*, that in consideration of half the outlay in excavating the *kul*, which originally belonged to defendant and his ancestors, but had fallen into disrepair and become useless, the plaintiff was to become a half-sharer therein: that thenceforth the income and expenditure on the *kul* was to be shared in the same proportion, and that in the event of a sharer failing to pay the expenses of repairs, he was to be debarred from participating in the income of that year. Defendants admitted the agreement and rendition of accounts till 1936 *Sambat*, but alleged that after that year the *kul* was stopped, and litigation ensued with the owners of certain villages; that plaintiff refused to contribute towards the expenses and gave up his share; and that defendants had conducted the cases themselves and enjoyed the profits of the *kul* ever since. The District Judge dismissed the suit on the ground that plaintiff, by refusing to contribute towards the expenses of the said litigation and by his subsequent conduct had abandoned and lost his rights in the *kul*. This decree was upheld on appeal by the Divisional Judge, both on the ground that plaintiff had abandoned and lost his said rights, and also that his conduct estopped him from preferring the present claim.

Plaintiff having appealed to the Chief Court, the defendants supported the decree of the Lower Courts, not only on the ground of abandonment and estoppel, but also on the grounds (a) that plaintiff's rights in the *kul* could not be proved, as the written agreement of 1873 required registration, and being unregistered was inadmissible in evidence; (b) that the suit was practically one for accounts of a partnership, and therefore could not lie without a prayer for dissolution; and (c) that the failure of plaintiff to contribute towards the expenses of repairs debarred him from claiming a share of the produce for any of the years for which accounts were claimed.

Held, that the claim was one relating to profits of immovable property, and that the right, in respect of which the parties were litigating and which formed the basis of the claim, was one regarding such property, and that, therefore, the limitation for the possession of a share in the *kul* would be 12 years whether under Article 142 or Article 144 of the Limitation Act.

Found, upon the evidence, that there was no proof of abandonment on the part of plaintiff.

Held, further, that the written agreement of 1873 did not require registration inasmuch as, taken as a whole, it meant nothing more than that the defendant agreed to give plaintiff a half share in the *kul*, provided that the latter paid a half share of the expenses of excavation, and that such a condition did not create a present right in the *kul*, but merely one that would come into existence in the event of plaintiff fulfilling the said condition.

Held, also, that even if it were conceded that a present right was created by the instrument, it was only a right in the ruined *kul*, which had at the time no value at all, and certainly could not be said to have

The references are to the Nos. given to the cases in the "Record."

No.

been worth Rs. 100, and that the valuable property which might come into existence if the conditions of the agreement were carried out could not be held to furnish the test of valuation.

Section 17 of the Registration Act must be strictly construed, and unless a document is clearly brought within the purview of the section, it cannot be excluded from evidence, and in case of doubt, the benefit must be given to the document.

Held, upon the facts of the case, that the claim was one for accounts of a co-ownership in immovable property, and not of a partnership.

Held, finally, that the agreement, rightly construed, only deprived a co-sharer of the income in case he refused to pay his quota of expenses of repairs, &c., and that mere non-payment did not amount to such refusal, though defendant was entitled to deduct the amount of the said expenses from plaintiff's share of the profits 5

Registration Act, 1877.—Section 49.—See Section 17, *supra*.

" " " Section 49.—*Mortgage-deed relating to immovable property*
—*Deed compulsorily registrable, but registered in wrong Registry Office—*
Admissibility of deed in evidence—Registration Act, 1877, Section 49—
Fraud.

Held, that the mere fact that a mortgage-deed, which is compulsorily registrable, has been registered in a wrong Registry Office, does not render such deed inadmissible in evidence as against a purchaser at execution sale of the land mortgaged, who, not knowing that such land was subject to mortgage, does not plead that he was misled by the deed not being registered at the proper office, or that he was induced to purchase because, on inquiry, at the latter office, he learnt that there was no outstanding incumbrance.

A plea that the said mortgage was in fraud of creditors, *held*, not established 4

" " " Section 50.—*Lis pendens—Registered and unregistered deeds—Registration Act, 1877, Section 50*—Section 50 of the Registration Act, 1877, gives priority to registered documents of certain specified classes, as regards property comprised therein, over unregistered documents relating to the same property, not being decrees or orders, provided, in the latter case, that such decrees or orders are prior in point of date to the registered document.

Where, however, an unregistered mortgagee had already brought his suit to enforce his mortgage, *held*, that a mortgage, by registered deed, of the same property made during the litigation must, in accordance with the principles of *lis pendens*, be treated as subject to the result of the suit

Regularity of proceedings—Presumption as to—See Limitation Act, 1877, 2nd Schedule, Article 141.

Regulation, XVII of 1806.—See *Limitation Act, 1877, 2nd Schedule, Article 141.*

" " " See *Mortgage, No. 6.*

Removal of Guardian.—See *Guardian and Wards Act, 1890, No. 1.*

The references are to the Nos. given to the cases in the "Record."

No.

Res-judicata.—See *Civil Procedure Code*, Section 13.

" " See *Custom III—Inheritance*, No. 8.

" " See *Limitation Act*, 1877, 2nd Schedule, Article 141.

" " *Res-judicata—Omission by guardian ad litem of minor to appeal against decree—Gross negligence on part of guardian—Effect of such decree.*
—Where in a previous suit a decree was passed against the present plaintiff, who at the time was a minor, and was duly represented by his mother as his guardian *ad litem*, held, that the omission by the latter to appeal on his behalf from such decree, notwithstanding that there were excellent grounds, both in law and on the facts, for an appeal, amounted to gross negligence on her part, and that under such circumstances it would be contrary to law and equity to hold the plaintiff bound by the former decree.

The position of a guardian *ad litem* of a minor being that of a trustee, he is bound strictly to act in the interests of the minor, and he has not the liberty, as long as he retains his position, of abandoning the case as he would have were it his own, unless such abandonment is clearly in the interests of the minor. Every case must be judged by its own facts, and for the purpose of finding out whether such guardian was guilty of laches or fraud in previous proceedings, the Court has power to go into them and to form its own conclusions regarding them

35

Reversioners.—*Joint suit by reversioners against person in unlawful possession—Misjoinder of causes of action.*—See *Cause of Action*.

" *Custom—Succession to childless proprietor—Exclusion of near collateral by proprietors of village—Village founded within boundaries of old village—Right of collaterals residing in latter to succeed to land in former—Succession of adopted son in his natural family—Riwaj-i-am.*—See *Custom III—Inheritance*, No. 6.

" *Custom—Succession—Suit between co-proprietors of village in which the land was situate and deceased's near agnates residing in another village—Finding in a previous suit that one of the co-proprietors was deceased's collateral, effect of—Res-judicata—Dhillon Jats of Narain-garh, Amritsar District.*—See *Custom III—Inheritance*, No. 8.

" *Mortgage by widow—Decree of foreclosure against widow—Suit by reversioners for recovery of land after death of widow.*—See *Limitation Act*, 1877, 2nd Schedule, Article 141.

" *Speculative suit by reversioners for declaratory decree.*—See *Specific Relief Act*, 1877, Section 42.

Reversioners—Locus standi of.—See *Cause of Action*.

" See *Custom II—Alienation*, Nos. 3, 4, 6 and 8.

" See *Occupancy Rights*, Nos. 2 and 3.

Review of judgment.—See *Civil Procedure Code*, 1882, Section 623.

Revision in civil cases.—*Civil Procedure Code*, 1882, Section 622—*Power of Chief Court in revision to dispose of case on merits.*—See *Burden of Proof*, No. 5.

" " " *"Material irregularity"—Contradictory finding by lower Appellate Court.*—See *Burden of Proof*, No. 6.

The references are to the Nos. given to the cases in the "Record."

No.

Revision in civil cases.—Application for revision—Other remedy open to applicant.—
See *Civil Procedure Code*, 1882, Section 520.

" " " " *Small Cause Court Act*, 1887, Section 25—*Second application for revision after rejection of first application.—See Civil Procedure Code*, 1882, Section 623.

" " " " *Guardian and Wards Act*, 1890, Sections 12 (3) (b), 47—*Preliminary order as to custody of property—Revision.—See Guardian and Wards Act*, 1890, No. 2.

" " " " *Provincial Small Cause Court Act*, 1887, Section 25—*Revision—Wagering transaction—Written contract—Admissibility of evidence to prove that contract was void under Section 30 of the Contract Act—Evidence Act*, 1872, Section 92.

The Judge of the Small Cause Court dismissed plaintiffs' suit on the ground that the evidence proved that the written agreement sued upon, which purported to be one for sale of silver, was not a *bonâ fide* transaction, no actual interchange of silver being contemplated, but merely an adjustment of profit and loss with reference to a difference in the market rates. Plaintiffs applied to the Chief Court for revision of the order of dismissal on the ground, (1) that there was no evidence to show that delivery of silver was not intended, and (2) that oral evidence was inadmissible to contradict the terms of the written agreement according to which silver was to be delivered.

Held, that as there was evidence on which the Judge of the Small Cause Court might base his finding that the transaction was a wager, that finding should not be disturbed on revision.

Held, further, that the oral evidence was admissible, under the first proviso to Section 92 of the Evidence Act, for the purpose of invalidating the written agreement.

I. L. R., XVII Mad., 480, and *I. L. R.*, XII Bom., 585, followed; *I. L. R.*, IX Calc., 791, not followed 85

Right of way.—Easement—Public or private road—User of road by public for less than 20 years—Presumption as to dedication—Limitation Act, 1877, Section 26.—See *Easement*.

Right to sue.—See Cause of Action.

" See *Custom II—Alienation*, Nos. 3, 4, 6 and 8.

" See *Occupancy Rights*, Nos. 2 and 3.

Road, public or private—See Easement.

S.

Sale.—Suit for possession on ground that a certain sale was invalid as against plaintiff—Plea by defendant that plaintiffs acquiesced in sale—"Acquiescence"—Estoppel.—See Acquiescence.—

" *Res-judicata—House and land sold by one deed of sale—Suit in respect of house—Subsequent suit in respect of land—Finding in first suit that deed of sale was void, effect of, as regards subsequent suit—See Civil Procedure Code*, 1882, Section 13.

The references are to the Nos. given to the cases in the "Record."

No.

Sale.—*Sale of share of residential house by one of four Hindu co-sharers—House occupied by tenant—Right of vendee to joint physical possession—Civil Procedure Code, 1882, Section 263.—See Civil Procedure Code, 1882, Section 263.*

" *Pre-emption—Fraudulent concealment of sale—Limitation Act, 1877, Section 18, knowledge of facts, presumption as to.—See Limitation Act, 1877, Section 18.*

" *Suit to contest validity of sale—Right of plaintiffs to attack mortgage made in favour of vendee more than 12 years before suit—Merger of mortgage in sale—Limitation Act, 1877.—See Mortgage, No. 7.*

" *Pre-emption—Sale or contract to sell—Construction of document—Transfer of Property Act, 1882, Section 54.—See Pre-emption, No. 6.*

Security.—*Failure of guardian to furnish.—See Guardian and Wards Act, 1890, No. 1.*

Separation—Deed of—See Husband and Wife, No. 1.

Set-off.—Partnership—Lien—Contract Act, 1872, Sections 60, 61, 217, 262—Civil Procedure Code, 1882, Section 111.—See Partnership, No. 2.

Small Cause Court—Jurisdiction of—See Small Cause Court Act, 1887, 2nd Schedule, Article 13.

Small Cause Court Act, 1887—Section 25.—See Civil Procedure Code, 1882, Section 623.—Revision in Civil Cases, No. 6.

" " " " *Second Schedule, Article 13.—Jurisdiction of Small Cause Court—Suit by lessee of Government ferry for recovery of tolls—Small Cause Court Act, 1887, 2nd Schedule, Article 13.*

Held, that a ferry, such as that at Khushalgarh, must be regarded as immovable property vested in the Local Government, and that a plaintiff, when claiming as lessee of the ferry to recover tolls or dues, claims to recover by reason of an interest in immovable property transferred to him by Government.

Held, therefore, that such a suit is excluded from the cognizance of a Small Cause Court by Article 13 of the 2nd Schedule to the Small Cause Court Act, 1887

80

Specific Relief Act, 1877—Section 42—Declaratory decree, suit for, by reversioner—Speculative suit—Specific Relief Act, 1877, Section 42.—Plaintiff sued for a declaration that, after the death of Mussammatt J., who was at the time in possession of the property, with a widow's interest, they were entitled to succeed to it. Their suit was dismissed by the Divisional Judge on the ground that the widow had not done any act or made any alienation of the property which might raise an apprehension of injury to plaintiffs' right, there being no allegation that any denial of their rights was made before the institution of the suit.

Held, that the suit had been rightly dismissed

42

Speculative suit for declaratory decree.—See Specific Relief Act, 1877, Section 42,

The references are to the Nos. given to the cases in the "Record."

No.

Stamp Act, 1879—Section 34.—Document, construction of—Promissory Note, or acknowledgment of liability—Suit based on document stamped with anna-stamp—Admissibility of document in evidence—Right of plaintiff to fall back on original consideration—Evidence Act, 1872, Section 91—Stamp Act, 1879, Section 34.—See Promissory Note, No. 2.

Striking off defence.—See Civil Procedure Code, 1882, Section 130.

Sub-tenant.—See Landlord and Tenant, No. 1.

Succession Certificate Act, 1889.—Sections 4, 16.—Joinder of parties—Suit by representative of deceased mortgagee, who has obtained certificate under Act VII of 1889—Necessity of impleading mortgagee's other heirs—Act VII of 1889, Sections 4, 16.—See Joinder of Parties, No. 2.

Succession, Customary.—See Custom III—Inheritance.

T.

Tax leviable by the year.—See Punjab Municipal Act, 1891, Section 45.

Tenant.—See Landlord and Tenant.—Occupancy Right.

Toll—Suit for recovery of, by lessee of Government ferry.—See Small Cause Court Act, 1887, 2nd Schedule, Article 13.

Transfer of Property Act, 1882.—Section 54.—See Pre-emption, No. 6.

" " " " " Section 106.—See Landlord and Tenant, No. 2.

V.

" Vested in trust "—Meaning of.—See Limitation Act, 1877, Section 14.

Village proprietors.—Custom—Alienation—Escheat—Right of proprietary body to contest alienation by widow of childless proprietor—Kangra District—Right to sue.—See Custom II—Alienation, No. 4.

" " Custom—Succession to childless proprietor—Exclusion of near collaterals by proprietors of village—Village founded within boundaries of old village—Right of collaterals residing in latter to succeed to land in former—Succession of adopted son in his natural family—Riwaj-i-am.—See Custom III—Inheritance, No. 6.

W.

Wagering Contract.—See Revision in Civil Cases, No. 6.

Water of perennial stream.—Right to use.—See Pre-emption, No. 4.

Way—Right of.—See Easement.

Widow.—Custom—Alienation—Escheat—Right of proprietary body to contest alienation by widow of childless proprietor—Kangra District—Right to sue—See Custom II—Alienation, No. 4.

" Custom—Alienation—Gift by widow in favour of daughter married after death of widow's husband—Khanadamadi—Gujars of Gujrat—Riwaj-i-am.—See Custom II—Alienation, No. 5.

The references are to the Nos. given to the cases in the "Record."

No.

- Widow**—*Mortgage by widow—Decree of foreclosure against widow—Regulation XVII of 1806—Regularity of proceedings, presumption as to—Suit by reversioners for recovery of land after death of widow—Limitation Act, 1877, 2nd Schedule, Article 141—Res-judicata—Estoppel.—See Limitation Act, 1877, 2nd Schedule, Article 141, No. 1.*
- „ *Limitation Act, 1877, Articles 141, 142—Adverse possession—Suit by reversioners on death of widow.—See Limitation Act, 1877, 2nd Schedule, Article 141, No. 2.*
- „ *Occupancy Right.—Alienation by widow in favour of proprietor—Right of reversioner to object—Punjab Tenancy Act, 1877, Section 59 (3).—See Occupancy Right, No. 2.*
- „ *Partition—Right of widow who has succeeded to her husband's interests in joint holding to claim partition—Grant of such prayer by Revenue Officer—Jurisdiction of Civil Court to entertain subsequent suit by co-sharers objecting that widow is by custom not entitled to claim partition—"Question as to title"—"Owner" and "Landowner"—Punjab Land Revenue Act, 1887, Sections 111, 115, 116, 158.—See Partition, No. 3.*
- Will.**—*Distinction between wills and gifts inter vivos—Customary Law.—See Custom II—Alienation, No. 1.*
- „ *Limitation Act, 1877, 2nd Schedule, Article 93—Suit for declaration that an alleged will was a forgery, and that testator had no power to make such will—Custom—Succession of daughter.—See Custom III—Inheritance, No. 2.*
- „ *Will, construction of—Principles of construction—Bequest to Hindu widow as malik—Presumption as to nature of bequest to Hindu female.*

Although in construing a will, the Court should endeavour to gather the intention of the testator from the words actually employed by him, it is quite legitimate (subject to the express terms of the will) in construing the will of a Hindu with reference to a bequest in favour of a female to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. Ordinarily, their ideas are repugnant to giving a female a power of alienation over immovable property, especially if it is ancestral, and it may, therefore, be properly presumed, in the absence of clear indications to the contrary, that a devise of such property to a Hindu female does not confer an estate of inheritance, but only a life estate or a widow's estate as understood by Hindu Law. Nor is it a necessary result from the use of the term *malik* in respect of a Hindu female to whom a bequest is made, that she should be considered the absolute owner of the property so bequeathed to her.

Applying the above principles of construction to the terms of the will in the present case, the Court held that, as the words used by the testator on the whole admitted of the interpretation that it was intended to give merely a life estate or a widow's estate to the female devisee, such interpretation should have preference

27

Guardians and Wards Act, 1890, Sections 3, 7—"Will or other instrument"—Nuncupative will—Appointment of minor's heir as guardian of property.

The references are to the Nos. given to the cases in the "Record."

Held, that the provisions of Section 7 of the Guardians and Wards Act, 1890, do not apply to nuncupative wills.

Held, further, that inasmuch as a minor's heir is peculiarly interested in the good management of the property to which he hopes to succeed, there is no objection to the appointment of such a person as guardian of the minor's property as distinct from the minor's person

No.

54

Worldly Affairs—Abandonment of.—See *Abandonment of Worldly Affairs*.

INDEX OF NAMES (CIVIL).

The references are to the Nos. given in the "Record."

	No.
A.	
Abdul Kadir v. Nur-ud-din	14
Abdul Rahim Khan v. Muhammad Yar	12
Ahmad Ali Shah v. Amir Shah	35
Alam Sher v. Ram Chand	11
Amin Chand v. Phagu Mal	54
Arjan Singh v. Sochet Singh	52
Arur Singh v. Mussammat Lachmi	75
Asa Singh v. Indar Singh	91
Aulia v. Alu	49
B.	
Badri Das v. Municipal Committee, Delhi	90
Basheshar Das v. Bhagwan Das	44
Bates, Mr., v. Prestage	20
Beli Ram v. Chuha Ram	18
Budhe Khan v. Bir Bal	40
Budh Singh v. Mussammat Dhan Kaur	57
Buta v. Mussammat Jiwani	82
Buta Singh v. Chanda Singh	47
C.	
Chet Singh v. Samand Singh	78
Chiragha v. Mahtaba	79
Chundar Bhan v. Ahmad Yar Khan	36
D.	
Daulat Ram v. Rup Lal	59
Desa Singh v. Narain Das	80
Devi Ditta v. Pareman	71
Dholan Das, Lala, v. Ralya Shah	85
F.	
Fateh Ali Shah v. Miran Bakhsh	60
Fateh Khan v. Muhammad	98
G.	
Ganda Mal v. Thakar Mal	97
Ganga Singh v. Mussammat Shib Devi	33
H.	
Hakim v. Jagat Singh	87
Hakim v. Nadim Gul	30
Hamira v. Sandar	13
Harbhaj, Lala, v. Bhana	26
Harnam Singh v. Mussammat Kishni	95
Haryans Singh v. Harnam Singh	84
Hira Singh v. Sher Singh	29

The references are to the Nos. given to the cases in the "Record."

	No.
I.	
Ibrahim v. Mussammat Fatima	67
Imam Din v. Feroz Khan	64
Inayat Ali v. Lachman Singh	8
Ishar Singh v. Lal Singh	39
J.	
Jagan Nath v. Tulsi Das	72
Jaisukh v. Dina Nath	58
Jowahir Singh v. Dial Singh	76
Jowala Singh v. Kala Singh	22
K.	
Kahan Chand v. Mussammat Indar Kaur	23
Karam Din v. Sbaraf Din	89
Kartar Singh v. Mathar Singh	94
Khaira v. Pir Bakhsh	1
Khanu Mal v. Khan Muhammad	6
Khushali Mal v. Pala Mal	43
Kundan v. Sundar Singh	74
M.	
Mahtab-ud-din v. Karam Ilahi	73
Man Singh v. Dip Singh	96
Mehr Chaud v. Syad Muhammad Latif	99
Mir Khan v. Jiwe Khan	28
Moti Ram v. Kamman	88
Mughal v. Jalal	69
Muhammad Azim v. Muhammad Ji	7
„ Husain v. Abdul Rahman	86
Muhammadi v. Mussammat Jiwani	42
Municipal Committee, Umballa, v. Bhagwan Das	55
Mussammat Emma v. Sajawal Khan	37
„ Gulab Khatau v. Mian Muhammad	5
„ Hem Kaur v. Rai Daulat Ram	10
„ Manso v. Batnu	3
„ Nekhan v. Muhammad Khan	46
„ Nikki v. Bishen Das	41
„ Wazir Begam v. Mussammat Piyari Begam	50
N.	
Narain Das v. Manohar Lal	21
Nidhu v. Nihala	15
Nihala v. Bikhram Ram	81
Nizam Din v. Jagat Singh	25
O.	
O'Gorman v. Mahtab Singh	92
P.	
Petman v. Ramsay	16
Pir Bukhsh v. Kudir Bakhsh	32
Pirbhi Mal v. Mussammat Bhagan	3
Pritha Das v. Hira Singh	63

The references are to the Nos. given to the cases in the "Record."

	No.
R.	
Rahim Bakhsh, Malik, v. Mussammat Fakhar-un-Nisa	31
Raja of Faridkot v. S. Gurdial Singh	34
Rallia Ram v. Mussammat Ved Kaur	27
Ram Sukh Das v. Fazal-ud-din	19
Rana, Ganpat Singh v. Kangra Valley Slate Coy.	62
Rukan Din v. Mussammat Mariam	68
S.	
Sadhu v. Misri	93
Sadhu Ram v. Mussammat Baini Bai	86
Saghar Mal v. Hyat	38
Sansar Singh v. Tiloka	51
Sant Ram v. Mussammat Mohan Devi	56
Sarup Singh, Sardar, v. Sundar	9
Sawan Mal v. Devi Dial	45
Shad Ali Khan v. Abdul Ghafur Khan	24
Shaman v. Sardha	61
Shankar Das v. Kailash Chandar	65
Sohna v. Nand Ram	53
Sunder Singh v. Jiwan Ram	83
Sykes v. Municipal Committee, Dharmesala	4
T.	
Tara Singh v. Sohan Shah	17
Tej Ram v. Tulsi	48
U.	
Umar Bakhsh v. Abdul Karim	70
Umrao Singh, Sardar, v. Sardar Thakar Singh	77
Z.	
Zafaryah Khan v. Fattch Ram	100



Chief Court of the Punjab.

CIVIL JUDGMENTS.

No. 1.

Before Sir Charles Roe, Kt., Chief Judge.

KHAIRA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

PIR BAKHSH AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1180 of 1897.

Custom—Adoption of sister's son—Muhammadian Jats of Zira tahsil, Ferozepore District.

Found, that defendants, upon whom the onus rested, had failed to prove that by custom among Muhammadian Jats of the Zira tahsil, Ferozepore District, the adoption of a sister's son is valid in the presence, and without the consent, of the adoptive father's agnates.

Further appeal from the order of Khan Muhammad Hayat Khan, C. S. I., Additional Divisional Judge, Ferozepore Division, dated 3rd July 1897.

Janki Nath Kaul, for appellants.

The preliminary order of the learned Chief Judge, in chambers, was as follows:—

ROE, C. J.—There is certainly a strong initial presumption against the validity of the adoption of a sister's son by a Muhammadian Jat of the Zira tahsil of the Ferozepore District. The *Riwaj-i-am* is against it, and the report of the local Commissioner (the Tahsildar) is against it. The instances given of such an adoption, even if duly verified, *i.e.*, if it were proved that the person adopted actually succeeded to land to the exclusion of agnates, seem quite insufficient to prove a custom sanctioning such adoptions. It is not correct to speak of the *Riwaj-i-am*, and the Settlement Officer (Mr. Francis) commenting on it as showing that such a custom previously existed, but was changed at settlement; what really happened was that the persons recording the answers in the *Riwaj-i-am*, whilst admitting that isolated cases of such adoption might have occurred in earlier times, declared that the general custom of their tribe did not recognize them. Admitted. 11th Decr. 1897.

Jaishi Ram and Lajpat Rai, for appellants.

Sham Lal, for respondents.

The judgment of the learned Chief Judge was as follows :—

7th Feby. 1898.

ROE, C. J.—My order of the 11th December may be read as a part of my present order.

As therein remarked, it was certainly for the defendant to prove that the adoption was valid by custom. Only four instances of such adoption are given, and they occurred long ago. Even if they were proved fully, as stated in my note, they would be quite insufficient to prove a custom. It is not denied that such adoptions could take place with the consent of the agnates, and in early days, when land was of little value, they were sometimes made without opposition. But it is quite incorrect to say that there was ever a custom allowing them to be made in spite of the opposition of the agnates.

The decision of the lower Court is reversed, and plaintiffs will receive a declaratory decree that the adoption now challenged is invalid, and will not affect their right as reversioners. As usual in these cases, the parties will pay their own costs throughout.

Appeal allowed.

No. 2.

Before Mr. Justice Frizelle and Mr. Justice Stogdon.

PIRTHI MAL,—(PLAINTIFF).

Versus

MUSSAMMAT BHAGAN,—(DEFENDANT).

Case No. 6 of 1897.

Contract Act, 1872, Section 23—Immoral contract—Suit for rent for house let to prostitute.

Plaintiff, who was the owner of a house which he had let to defendant, a prostitute, in the ordinary way of business, sued for recovery of the rent. It appeared that plaintiff probably knew that defendant was a prostitute, but it was not shown that the house was let for the express purpose of being used as a brothel or that plaintiff was to have any share in, or receive rent out of, defendant's earnings as a prostitute.

Held, that the agreement was not immoral, and that plaintiff was entitled to recover the rent due thereunder.

Case referred by M. L. Waring, Esquire, Judge, Small Cause Court, Kasauli.

The opinion of the Court was as follows :—

5th Jany. 1898.

FRIZELLE, J.—Plaintiff is the owner of a house and has let it on rent to defendant, who is a prostitute. We are asked

by the lower Court whether under Section 23 of the Indian Contract Act plaintiff can maintain a suit for recovery of the rent, as the house was let for an immoral purpose. It appears that the house was let in the ordinary way of business. Plaintiff probably knew that defendant is a prostitute, but there is nothing to show, and it is not alleged, that the house was let for the express purpose of being used as a brothel or that plaintiff was to have any share in defendant's earnings as a prostitute or to receive the rent out of those earnings. Under the circumstances we are of opinion that the agreement was not immoral. The lower Court should decide the case accordingly.

No. 3.

Before Sir Charles Roe, Kt., Chief Judge.

MUSSAMMAT MANSO,—(PLAINTIFF),—APPELLANT,

Versus

RATNU,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Case No. 712 of 1897.

Custom—Succession—Right of daughter to succeed to her father's first cousin—Kanets of Kangra District.

Found, that plaintiff had failed to prove that, by custom among Kanets of Kangra District, a woman is entitled to succeed to the estate of her father's first cousin after the succession and subsequent death of the latter's widow, to the exclusion of the agnatic heirs.

Semle: Among Kanets of the Kangra District, a daughter is entitled to succeed to her father's estate to the exclusion of remote collaterals.

Further appeal from the order of R. Sykes, Esquire, Divisional Judge, Kulu, at Dharmsala, dated 19th March 1897.

The judgment of the learned Chief Judge was as follows:—

ROE, C. J.—After hearing Mr. Golak Nath on the 6th instant, and reading the evidence, I am of opinion that the decision of the Divisional Judge is right. As observed by him, the question is not whether a daughter succeeds to her father's estate to the exclusion of remote collaterals,—a proposition which finds support in the *Rivaj-i-am* of Kangra and in the evidence of the present case,—but whether a daughter succeeds to the estate of her father's first cousin after the latter's widow's succession and death, to the exclusion of the agnatic heirs. This is a very different proposition, and it appears to me quite opposed to the fundamental principle of Tribal law, which is that of agnatic

8th Jany. 1898.

succession. This principle is occasionally modified in favour of daughters (1) by allowing them to hold the estate till marriage, in lieu of the maintenance and marriage expenses to which they are undoubtedly entitled, (2) by allowing them to succeed and pass on the estate to their sons, who, when the agnates are very remote, may be regarded as the natural heirs of the last male owner. But to allow a female to practically take up a position as an agnate, and take the estate of her father's cousin, and hold it at any rate for life just as if she were an agnate, is, as I have said, a totally different matter, and the evidence in the present case quite fails to prove that such is the custom.

The Divisional Judge is also right in holding that the matter is not *res judicata*: assuming that it is so as regards Nokhu, that would not affect the other agnates. The only result of excluding Nokhu would be that the others would step into his place.

The decision is confirmed under Section 551, Civil Procedure Code.

No. 4.

Before Mr. Justice Frizelle and Mr. Justice Stogdon.

Mr. R. SYKES,

Versus

THE MUNICIPALITY OF DHARMSALA.

CASE No. 7 OF 1897.

Punjab Municipal Act, 1891, Sections 2 (2), 45 (8) (c)—Tax leviable by the year.

Held, that in a Municipality governed by Act XX of 1891, a tax leviable by the year is, under Section 45 (8), proviso (c), leviable by the Calendar year from the 1st January to the 31st December, and that the said proviso relates equally to taxes which were imposed before the said Act came into force and which had hitherto been levied by the Financial year from the 1st April to the 31st March.

Case referred by Major F. W. Egerton, District Judge, Kangra.

The order of the Chief Court was as follows:—

11th Jany. 1898.

STODDON, J.—The question we are asked to decide is whether, in a Municipality governed by Act XX of 1891, a tax leviable by the year is leviable by the Calendar year from the 1st January to the 31st December, or by the Financial year from the 1st April to the 31st March following.

In our opinion it is clear from Section 45, sub-section 8, proviso (c), that it is leviable by the Calendar year, if imposed

REFERENCE SIDE. {

under Act XX, 1891. The only question is whether the proviso in question relates to taxes which were imposed long before Act XX, 1891, came into force, and which have hitherto been levied by the Financial year. It is clear from Section 2, subsection (2), that such taxes, though imposed under a previous Act, must, so far as may be, be deemed to have been imposed under Act XX of 1891. Such being the case, the proviso relates to them, and they are leviable by the Calendar year, and that is our answer to the reference.

No. 5.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Reid.

MUSSAMMAT GULAB KHATAN AND OTHERS,—
(DEFENDANTS),—APPELLANTS,

Versus

} APPELLATE SIDE.

MIAN MUHAMMAD AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 281 of 1896.

Limitation Act, 1877, 2nd Schedule, Article 93—Suit for declaration that an alleged will was a forgery and that testator had no power to make such will—Custom—Succession of daughter.

On the death in 1866, of one M. M. who left a widow and three daughters, mutation of names in respect of his property was effected in favour of the widow, who applied in 1877 to have mutation in respect of three-fourths of the said property effected in favour of the daughters, in virtue of a will purporting to have been executed in their favour by M. M. shortly before his death. This application was resisted by the present plaintiffs, collaterals of M. M., and rejected on the ground that the will was probably a forgery. In 1872 and 1887 the widow dealt with the property in suit as her own, and on the second occasion plaintiffs obtained a decree declaring that her dealings with the property did not affect their reversionary rights. In 1894 the daughters sued the widow for possession of three-fourths of the said estate and obtained a decree on a confession of judgment. Plaintiffs, who were no parties to the said suit, in November 1894, instituted the present suit for a declaration that (i) the said will was a forgery, (ii) M. M. had no power to make such a will, and that if genuine, it was never acted on and was inoperative, and (iii) that the decree in favour of the daughters was collusive and inoperative against their rights as reversioners. Defendants pleaded that plaintiffs' suit was barred by limitation, that the will was genuine, and that, in any event, the daughters were entitled to succeed in preference to male collaterals such as the plaintiffs.

Held, (i) that the proceedings in 1894 gave rise to a fresh cause of action, and that the suit was within limitation; (ii) that the alleged will had not been proved to be genuine; and (iii) that no special custom had

been proved to exist among the parties whereby daughters were entitled to succeed in the presence of male collaterals.

Further appeal from the order of D. C. Johnstone, Esquire, Divisional Judge, Jhelum Division, dated 23rd December 1895.

K. P. Roy, for appellants.

Browne, for respondents.

The judgment of the Court was delivered by

14th Jany. 1898.

REID, J.—The plaintiffs, respondents, are male collaterals of one Mian Muhammad, who died in 1866 leaving a widow and three daughters. On his death mutation of names in respect of his property was effected in favour of the widow, who applied in 1877 to have mutation in respect of three-fourths of the property effected in favour of the daughters in virtue of a will purporting to have been executed in their favour by Mian Muhammad shortly before his death. This application was resisted by the respondents, and rejected on the ground that the will contained alterations and was probably a forgery.

In 1872 and in 1887 the widow dealt with the property in suit as her own, and on the second occasion the respondents obtained a decree declaring that her dealings with the property did not affect their reversionary rights.

In 1894 the daughters sued the widow for possession of three-fourths of the estate left by their father, and obtained a decree on a confession of judgment. The respondents were not parties to this suit, and in November 1894 instituted the present suit for a declaration—

- (a) that the will in question was a forgery;
- (b) that Mian Muhammad had no power to make such a will, and that, if genuine, it was never acted on, and was inoperative;
- (c) that the decree of 1894 in favour of the daughters be declared collusive and inoperative against the rights of the respondents.

The Court of first instance held that there were good and reasonable grounds for holding that the will was a forgery, and passed a decree declaring (a) that the will was never acted on and was inoperative, (b) that the decree of 1894 was collusive and did not affect the rights of the respondents.

This decree was affirmed by the learned Divisional Judge, who held that a suit merely for a declaration that the will

was a forgery would have been barred by Article 93, Schedule II, of the Limitation Act, but that it was unnecessary to discuss that question, no declaration to that effect having been decreed. It was further held that the will was a forgery, and had never been acted on, while it was probably opposed to custom, and that the decree of 1894 was collusive.

The first question for decision is whether the suit was within limitation.

The pleader for the appellants relies on No. 57, *Punjab Record*, 1891, No. 52, *Punjab Record*, 1895, and No. 75, *Punjab Record*, 1896, for the proposition that Article 93 is applicable and that the suit is barred, not having been instituted within three years of the attempt to use the will against the respondents.

As recently pointed out in a judgment of this Court, the authorities relied on are not applicable to a case in which the instrument set up can be ignored by the plaintiff.

In No. 75, *Punjab Record*, 1896, the plaintiff was an executant and pleaded undue influence, and minority at date of execution.

In No. 52, *Punjab Record*, 1895, the principle laid down was that in all suits in which there is a document, executed either by the plaintiff himself or those under whom he claims, which may be pleaded in complete bar of the claim, the plaintiff must fail unless he is in time for claiming cancellation of such deed. The respondents do not claim through Mian Muhammad, but through their and his common ancestor. They assert that Mian Muhammad had no power to transfer the property in suit by will.

In No. 57, *Punjab Record*, 1891, the transferrer was the elder brother and *sarbarah* of the plaintiff, for whom he purported to act. The Full Bench rulings of this Court, No. 116, *Punjab Record*, 1890, and No. 18, *Punjab Record*, 1895, are in favour of the proposition that the present suit is within time, and it is clear that the proceedings of 1894 gave rise to a fresh cause of action. We have no hesitation in holding that the plea of limitation fails. It is further contended that the will is genuine, and that the reasons given by the lower Appellate Court for holding that it is a forgery are unsound. Although the argument that the possible birth of a son need not have been provided for by the will, as such son would take in preference to the daughters, has force, the other reasons given by

the Courts below for holding that the will was a forgery have force, and we hold that the appellants have signally failed to prove that it is genuine.

In this view of the facts it is unnecessary to enter into the question whether such a will, if genuine, would be valid.

It has been further argued that the daughters are entitled to succeed in preference to the respondents. No evidence has been adduced in support of this proposition, and we must hold that no special custom to this effect has been proved. On the contrary, the whole course of action of the appellants and the widow proves that they never had the least idea that the claims of daughters were preferential to those of the respondents; there would otherwise have been no necessity for setting up the will, and the rights of the daughters, as such, were not set up in the memorandum of appeal in the lower Appellate Court. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 6.

Before Mr. Justice Chatterji and Mr. Justice Clark.

APPELLATE SIDE. {	KHANU MAL,—(PLAINTIFF),—APPELLANT,
	<i>Versus</i>
	KHAN MUHAMMAD AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Case No. 1248 of 1896.

Adverse possession—Mortgagee in possession—Adverse possession as regards mortgagee, effect of, upon rights of mortgagor.

Held, that inasmuch as a mortgagor, who has transferred possession of the mortgaged land to the mortgagee, has no right to possession thereof until he has redeemed the mortgage, the possession of a third party, though adverse as regards the mortgagee whom he has ousted, does not, when unaccompanied by further acts of aggression upon the mortgagor's rights, give any cause of action to the latter during the continuance of the mortgage, and that, therefore, the burden of proving that his possession was adverse as against the mortgagor no less than as against the mortgagee rests upon such third party.

I. L. R., XVIII, Bom., 51, followed.

Held, upon the facts of the case, that defendants had failed to prove that their possession was adverse as against the plaintiff-mortgagor.

Further appeal from the order of Captain C. S. Martindale, Divisional Judge, Mooltan Division, dated 29th August 1895.

Lal Chand, for appellant.

Oertel, for respondents.

The judgment of the Court was delivered by

CLARK, J.—Plaintiff was the owner of the well; in 1862 4th Jany. 1898. (Sambat 1917), he sold $\frac{2}{16}$ and mortgaged $\frac{4}{16}$ to defendants 1 and 2; he has now redeemed $\frac{2}{16}$ of the $\frac{4}{16}$ mortgaged, and claims possession; he is resisted by defendants 3 to 8, who are the sons and relatives of Arif Khan.

Defendants 3 to 8 say that the well is their ancestral property, and that they have had adverse possession for over 12 years.

The issues are—1, is the land in dispute ancestral property of Arif Khan?

2. Have defendants 3 to 8 acquired title by adverse possession?

At mutation of names during the Settlement of 1878 the statements of all parties—plaintiff, defendants 1 and 2, and Arif Khan—were recorded, and throw a clear light on the case.

Arif Khan then stated that plaintiff had sold and mortgaged $\frac{2}{16}$ to defendants 1 and 2, and that he had bought $\frac{4}{16}$ from defendants 1 and 2, and had taken the other, $\frac{4}{16}$ which had been given up by defendants 1 and 2 on account of *khasara*; he had admittedly become the purchaser of the other $\frac{4}{16}$, and he claimed to be recorded as owner of the whole well, as he had borne the *nafa-nuksan* for 20 years.

The order of 22nd November 1878 was, that Arif Khan should be recorded as proprietor of $\frac{1}{16}$ of the well, and plaintiff as proprietor of $\frac{4}{16}$ with defendants 1 and 2 as mortgagees for Rs. 700, and this is the entry still kept up in the revenue records. There has been a mistake by which Arif Khan is recorded as owner of the $\frac{4}{16}$, and plaintiff of $\frac{1}{16}$, but this is not of importance; it is only a case of the figures having become inverted.

On issue 1 it is clear, then, that the land in dispute is not the ancestral property of Arif Khan, and this was what was found by both Courts. The land originally belonged to plaintiff, who mortgaged it to defendants 1 and 2 about 1862, and Arif Khan acquired it from defendants 1 and 2 in some way not satisfactorily explained, and has been holding it any way for 14 years without making any payment to defendants 1 and 2. It is noticeable that in 1878 both defendants 1 and 2 and Arif Khan claimed to be in possession of the land.

With reference to the question whether defendants 3 to 8 have acquired title to the land by adverse possession, the first

Court found that they had not, but the Divisional Judge found that they had, relying on *Punjab Record* No. 161 of 1889.

That judgment is, however, if anything, against them. There the party in possession set up a title derived from a third person, and no way from the mortgagee; and Mr. Justice Rivaz there stated that where the person in possession sets up a title derived from the mortgagee, as, for instance, where the mortgagee has transferred his rights as such, or otherwise permitted a stranger to occupy the land, the party in possession is technically the mortgagee, and can be redeemed by the mortgagor within 60 years. We think it must be held that Arif Khan was permitted to occupy by the mortgagee.

He was a shareholder in the well of $\frac{6}{16}$ by purchase from defendants 1 and 2, and must have well known that defendants 1 and 2 were only mortgagees of the $\frac{6}{16}$ in dispute; he must also have known that plaintiffs were recorded as proprietors of this $\frac{6}{16}$ in the revenue records. His possession may have been adverse to the mortgagees, but there is no ground for thinking that it was adverse to the mortgagors. Adverse possession is defined by Mr. Justice Markby as possession by a man holding the land on his own behalf, or on behalf of some person other than the true owner, the true owner having a right to immediate possession (*I. L. R., IV Calc.*, 327). A mortgagor has not a right to possession until he has redeemed the mortgage. According to *I. L. R., XVIII Bom.*, 51, it lay upon defendants 3 to 8 to prove that their possession was adverse to the mortgagor. Mr. Justice Fulton remarks in that case: "*In L. R., XIV Bom.*, 176, it was held that there can be an invasion of the rights of the mortgagor of such a nature as to render the possession of a trespasser on the property adverse to him. But I think that although the possession of a trespasser may undoubtedly be adverse to the mortgagor, the burden of proving when it becomes so rests on the former. *Primâ facie* by his act of possession he merely ousts the mortgagee, who is entitled to hold the property. Such ouster, unaccompanied by any further acts of aggression on the mortgagor's rights, cannot give any cause of action to the latter. During the continuance of the mortgage, the mortgagor cannot sue to recover possession of the land."

We do not think defendants have shown that their possession was adverse to plaintiff. Plaintiff is therefore entitled to recover the land.

We accept the appeal and restore the order of the first Court with costs throughout.

Appeal allowed.

No. 7.

Before Sir Charles Roe, Kt., Chief Judge.

MUHAMMAD AZIM, APPELLANT,

Versus

MUHAMMAD JI, RESPONDENT.

} APPELLATE SIDE.

Case No. 1319 of 1897.

Application to remove guardian on ground of failure to furnish security—Ex-parte order removing guardian—Application to set aside ex-parte order—Procedure.

Appellant was duly appointed guardian and received a certificate, but the order of the Court appointing him, while directing him to file security, did not specify the amount thereof, or the time within which it was to be filed. Subsequently, on an application by respondent, the District Judge in an *ex-parte* order directed that the guardian should be removed on the ground that he had not furnished security within a reasonable time. The guardian's application to have the *ex-parte* order set aside was rejected on the ground that his only remedy was by way of appeal therefrom.

Held, that the District Court had erred in holding that the application to have the *ex-parte* order set aside could not be entertained, the provisions of the Civil Procedure Code as regards procedure being applicable to cases under the Guardian and Wards' Act, unless the contrary is expressly declared.

Held, further, that the guardian should not have been removed for failure to give security, until a distinct order had been passed fixing the amount and the time within which it was to be filed, and the guardian had thereafter failed to comply with such order.

Miscellaneous appeal from the order of Lieutenant B. C. Waterfield, District Judge, Peshawar, dated 23rd October 1897.

Muhammad Shah Din, for Appellant.

Oertel and Gokal Chand, for Respondent.

The judgment of the learned Chief Judge was as follows:—

Roe, C. J.—The facts are briefly that Muhammad Azim 18th Jany. 1898 was duly appointed guardian and received a certificate. The order appointing him directed him to file security, but did not mention the time within which this was to be done.

On an application by Muhammad Ji for his removal, which alleged various grounds, and, amongst others, a failure to

furnish security, the District Judge, in an *ex-parte* order, dated 24th September, dealing with the last allegation alone, held that as the guardian had not furnished security within a reasonable time, he should be removed, and the order was made accordingly.

The guardian's application to have the *ex-parte* order set aside was rejected on the ground that the only remedy was an appeal. Two appeals have been preferred, one against the order refusing to set aside the *ex-parte* order and the other on the merits.

I think that the grounds for setting aside the *ex-parte* order are good, and the Lower Court was wrong in holding that the application could not be entertained. The general provisions of the Civil Procedure Code as regards procedure are applicable to cases under the Guardian and Wards' Act, and indeed to all cases under special Acts, unless the contrary is expressly declared.

As regards the appeal on the merits, it is clear to me that the District Judge should not have removed Muhammad Azim for failure to give security, until a distinct order had been passed fixing the amount and the time within which it was to be filed. I, therefore, set aside the order of removal, and direct the District Judge to proceed afresh to the consideration of the petition of Muhammad Ji and its various allegations. If he is then of opinion that the one regarding failure to furnish security is the only one which requires an answer, he should, as directed above, call on the guardian to furnish security for a specific sum by a certain date, and defer further orders till this date is passed.

Law stamp on these two appeals to be refunded. The other costs in this Court will be paid by the parties incurring them.

Appeal allowed.

No. 8.

Before Mr. Justice Frizelle.

INAYAT ALI,—(JUDGMENT-DEBTOR),—PETITIONER,	} REVISION SIDE.
<i>Versus</i>	
LACHMAN SINGH, MINOR, THROUGH MUS- } RESPON- SAMMAT MAHTABI,—DECREE-HOLDER,— } DENT.	

Case No. 1426 of 1897.

Civil Procedure Code, 1882, Section 108—Money paid into Court—Ex-parte decree upheld—Application by decree-holder for payment of deposit—Execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.

When a sum of money is paid into Court under Section 108, Civil Procedure Code, in order to be delivered to plaintiffs, should the *ex-parte* decree be upheld, such sum becomes the decree-holder's money as soon as the *ex-parte* decree is upheld, and it is not necessary for him to apply for execution of the decree in order to obtain payment of the money.

When, therefore, in such a case the decree-holder applied for payment of the deposit more than three years after the decree was passed,

Held, that such application could not be considered an application for execution of decree, and was not barred under Article 179 of the 2nd Schedule to the Limitation Act.

Petition for revision of the order of G. L. Smith, Esquire, Divisional Judge, Delhi Division, dated 18th February, 1897.

Muhammad Shah Din, for petitioner.

Madan Gopal, for respondent.

The judgment of the learned Judge was as follows :—

FRIZELLE, J.—A decree was passed against the petitioner (Inayat Ali) in favour of Dil Singh on the 21st January 1892. It had been originally *ex parte*, but, on the application of the judgment-debtor, the *ex-parte* decree was set aside on condition of the amount of the decree (Rs. 515-13-3) being paid into Court, under Section 108, Civil Procedure Code. The decree-holder died soon after the decree was passed, and the money remained lying in Court in deposit. On 12th July 1895 the judgment-debtor applied for return of the money. The application was opposed by the present respondent, as heir of the decree-holder, and respondent was then ordered to apply for execution of the decree. He has now, on 28th May 1896, applied for payment to him of the Rs. 515-13-3 deposited in Court, and the first Court ruled that this application was barred by time, as made more than three years after the decree was passed, and rejected the application. The Divisional Judge has reversed this order, and I am of opinion that

25th Jany. 1898.

the Divisional Judge was right. The money was paid into Court under Section 108 in order to be delivered to plaintiff should the *ex-parte* decree be upheld. When the decree was upheld the money became the decree-holder's money, and no application for execution was necessary for the decree-holder to become entitled to it. His application for the money therefore cannot be considered an application for execution, *vide Punjab Record* 107 of 1881 and 27 of 1888.

On this view of the case, it is not necessary to decide whether the application is saved by Section 7 of the Limitation Act, but even if the application were to be treated as one for execution of decree, I should have no hesitation in holding that it is within time under Section 7. The respondent is admittedly still a minor, and the first Court finds that he is the sole heir of Dil Singh under a will. If, as contended for the judgment-debtor, he has not been proved to be the sole heir, and there are other joint creditors, it does not appear how a discharge from the debt under the decree could have been given by any one of them without the consent of the others; Section 8 is therefore inapplicable.

I dismiss the petition with costs.

Application dismissed.

No. 9.

Before Sir Charles Roe., Kt., Chief Judge.

SARDAR SARUP SINGH,—(PLAINTIFF),—APPELLANT,

Versus

SUNDAR AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 1302 of 1897.

APPELLATE SIDE. }

Custom—Succession—Ala and adna maliks—Mauza Manabad, tahsil Moga, Ferozepore District.

Held, that in Mauza Manabad, tahsil Moga, Ferozepore District, an *ala malik* is merely entitled, as a *taluqdar*, to 5 per cent. on the revenue, and further, that on the death of an *adna malik* without issue, the latter's estate does not revert to the *ala maliks*, but to the collaterals of the deceased.

Semle: In the said village, which is divided into *pattis*, on the death of an *adna malik* his land would, for default of nearer heirs, become *shamilat* of the *patti* and be divided among the *pattidars*.

Further appeal from the order of A. E. Hurry, Esquire, Divisional Judge, Ferozepore Division, dated 9th August 1897.

Roushan Lal, for appellant.

Dharm Das, for respondent.

The Judgment of the learned Chief Judge was as follows:—

ROE, C. J.—I think the decision of the Lower Courts *28th Jany. 1898.*
right. The case quoted for the appellant, No. 175 of 1888, cannot be taken as laying down any universal rule as to the rights of *ala maliks* and the burden of proof. It is obvious that the position of *ala maliks* varies greatly in different parts of the country. In some they are the real proprietors, and the *adna malik* is little more than a tenant with a right of occupancy. In other parts, the *adna maliks* are the real proprietors, and the *ala malik* is merely a *taluqdar* receiving a certain percentage on the revenue. In the present case, all that the *ala malik* is shown as entitled to is 5 *per cent.* on the revenue; there is no provision in the *Wajib-ul-arz* declaring that if an *adna malik's* line dies out, his land will revert to the *ala malik*, nor is there any instance of the plaintiff's thus acquiring an *adna malik's* holding. The history of the village, so far as it can be traced from the extracts from the pedigree table put up with the record, clearly suggests the inference that in the *pattis* which the *Sardar* who founded the village made over to the settlers, mostly his own relatives, whom he invited in, he retained nothing more than his 5 *per cent.* on the revenue; and the strong presumption is that, even if the defendants were not the collaterals of Baghel Singh, they would take his land merely as *adna maliks* of the *patti*, that is, the land of Baghel Singh would, for default of nearer heirs, become *shamilat* of the *patti*, and be divided amongst the *pattidars*, *i. e.*, the *adna maliks*.

Plaintiff's claim to succeed as the agnate heir of Baghel Singh is quite untenable. The decision is confirmed, and the appeal dismissed with costs.

Appeal dismissed.

No. 10.

Before Mr. Justice Reid.

MUSSAMMAT HEM KAUR,—(PETITIONER),

Versus

RAL DAULAT RAM,—RESPONDENT.

Case No. 1974 of 1897.

Guardian and Wards Act, 1890, Sections 12 (3) (b), 47—Preliminary order as to custody of property—Revision—Civil Procedure Code, 1882, Section 591.

At the hearing of an application, under Act VIII of 1890, for the custody of the person and property of a minor at the time living with

} REVISION SIDE.

his step-mother, the Court by an interlocutory order issued a commission to a certain *Munsif* to make a list of the property of the minor and to lodge it in Court for safe custody, care being taken that the step-mother was given the necessary utensils, clothes, &c., for her support and maintenance. The step-mother applied to the Chief Court on the Revision Side to set aside the said order, but it was objected on behalf of the respondent that, inasmuch as an appeal from the final order of the Lower Court in this case lay to the Chief Court, the order in question was not open to revision. On behalf of petitioner it was contended that, the property affected being in her possession, no order passed in appeal could remedy the injury caused by the order, which was *ultra vires* with reference to the provisions of Section 12, sub-section (3), clause (b), of Act VIII of 1890, and, further, that the petitioner was not bound to appeal against an order appointing the respondent guardian, while, in the event of his application being dismissed, she could not appeal against the order in question, which in any event did not affect the decision of the case, in the terms of Section 591 of the Civil Procedure Code.

Held, that the order in question being passed by the Court for the temporary custody and protection of the minor's property, and the custody of the *Munsif* being in effect the custody of the Court, did not violate the rule contained in Section 12 (3) (b) of Act VIII of 1890, and that the words "any person" in the said clause could not be interpreted to include the words "the Court."

The Court being satisfied that this was not a case in which the revisional powers of the Court should be exercised, dismissed the application.

Petition for revision of the order of Khan Bahadur Sayad Muhammad Latif, District Judge, Jullundur, dated 10th November 1897.

Beechey, for petitioner.

W. H. Rattigan, Madan Gopal and Bhagat Ram, for respondents.

The judgment of the learned Judge was as follows:—

25th Jany. 1897.

REID, J.—A preliminary objection was raised by the learned counsel for the respondent to the effect that, inasmuch as an appeal from the final order of the Lower Court in this case lies to this Court, no revision lies.

The order of which revision is sought was passed during the hearing of an application under Act VIII of 1890 for the custody of the person and property of a minor at the time living with his step-mother, his father's widow, and was as follows:—"I therefore issue a commission to Lala Atma Ram, "*Munsif*, to make a list of the property of the minor and to "lodge it in Court for safe custody, care being taken that the "widow is given the necessary utensils, clothes, &c., for her "support and maintenance."

Under Section 47 of the Act an appeal lies to this Court from an order appointing or refusing to appoint a guardian, and under Section 591 of the Code of Civil Procedure any irregularity or illegality in the order now in question might be set forth as a ground of objection in the memorandum of appeal, so far as it affected the decision of the case.

The learned counsel for the respondent quotes 114 *Punjab Record*, 1883, 125, *Punjab Record* 1892, *Chattar Singh v. Lekhraj Singh*, I. L. R., V All., 293, and *Farid Ahmad v. Dulari Bibi*, I. L. R., VI All., 233, as authority for the proposition that revision does not lie.

For the petitioner it is argued that the order in question is *ultra vires*, having regard to the provisions of Section 12 (3) (b), Act VIII of 1890, the property affected being in possession of the petitioner, and that no order passed in appeal could remedy the injury caused by the order. It is further argued that the petitioner is not bound to appeal against an order appointing the respondent guardian, while in the event of his application being dismissed she could not appeal against the order in question, and that in any event the order does not affect the decision of the case, in the terms of Section 591. Reliance is placed on a dictum in *Moti Lal Kashibhai v. Nana*, I. L. R., XVIII Bom., 35, to the effect that the object of Section 622 of the Code of Civil Procedure is to enable a party to a suit to get a decision or order of a Lower Court rectified by a High Court, when there would otherwise be no remedy. It is argued that the effect of the order in question is to deprive the petitioner of her property, and that it is inequitable that she should be compelled to wait for its restoration till she can file an appeal.

The order in question differs from those dealt with in the authorities relied on by the learned counsel for the respondent, and from the order in XVIII, Bom., in that it cannot be said to affect the decision of the case. At the same time, I do not feel called on to decide whether such an order could under any circumstances be revised, inasmuch as the order in question does not, in my opinion, violate the rule contained in Section 12 (3) (b).

The order was passed by the Court for the temporary custody and protection of the property of the minor, and the *Munsif* to whom the order was directed was apparently selected as the instrument of the Court, as being a person in whose discretion and honesty full confidence could be placed. His custody was the custody of the Court, and I cannot interpret

the words "any person" in Section 12 (3) (b) to include the words "the Court." In any event, whether my interpretation of the Section in question is correct or not, I am satisfied that this is not a case in which the revisional powers of this Court should be exercised. It is therefore unnecessary to refer the point raised to a Bench as *res integra*. Any claim to property made by the petitioner will, in due course, be investigated by the Court below.

I dismiss the application and, having regard to the position of the parties, I leave them to pay their own costs.

Application dismissed.

No. 11.

Before Mr. Justice Stogdon.

APPELLATE SIDE. {

ALAM SHER,—(PLAINTIFF),—APPELLANT,

Versus

RAM CHAND AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 1383 of 1897.

*Pre-emption—Punjab Laws Act, 1872, Section 9—Rights to use water of perennial stream.—"Immovable property"—*General Clauses Act, 1868, Section 2 (5).*

Held, that inasmuch as the water of a perennial stream comes out of land, the right to use such water is "a benefit arising out of land," and is, therefore, "immovable property" within the meaning of Section 2 (5) of the General Clauses Act, 1868, so as to found a suit for pre-emption in respect of a sale thereof under Section 9 of the Punjab Laws Act, 1872.

Further appeal from the order of Rai Bahadur Lala Buta Mal, Divisional Judge, Jhelum Division, dated 4th November 1897.

Lal Chand, for appellant.

Gobind Ram, for respondents.

The judgment of the learned Judge was as follows:—

3rd Feby. 1898.

STODDON, J.—There is a perennial stream (Jai), from the water of which certain lands in the village of Katha Masral in the Khushab *tahsil* of the Shahpur District are irrigated Ahla, Ali and their minor brother Wir Khan owned, along with other persons, the right to irrigate for three watches (*pahar*). The share of Ahla and his brothers was one-third, or one watch. All three watches are mortgaged for Rs. 800 to one Karam. On the 1st November 1895, Ahla and Ali, for themselves and Wir Khan, sold their equity of redemption of their one-third share to Ram Chand and Aya Ram for Rs. 333.

* Now replaced by Act X of 1897, Section 3 (25)—*Ed., P. R.*

Alam Sher sued for pre-emption. In their written answer the vendees admitted his right, but their pleader subsequently urged that the property sold was not immovable, and could not therefore be the subject of pre-emption under Section 9 of the Punjab Laws Act, 1872. Wir Khan by his guardian *ad litem* pleaded that the sale of his share, not having been made for his benefit, was bad. The first Court held that the property was immovable, and that the sale of Wir Khan's share was illegal. It therefore gave plaintiff a decree for pre-emption of a $\frac{2}{3}$ rd's share of the right claimed. The vendees alone appealed to the Divisional Judge, who dismissed the suit on the ground that the thing sold was not immovable property.

According to Section 2, sub-section 5, of the General Clauses Act, 1868, immovable property includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. I am inclined to think that water, as long as it is flowing in the bed of a stream or river, is attached to the earth, and is therefore immovable property, though it can be made into movable property by severance or removal from the earth, but the subject matter of the suit is not any particular water, but the right to the use of water. The right to such use is certainly a benefit and it arises out of land, because the water of a perennial stream comes out of land. Even if it came out of the clouds, I should be inclined to hold that the benefit arises out of land, because the water must be first received by the land before it can be beneficially diffused. As plaintiff's superior right was admitted by the vendees, I doubt whether the Courts should have allowed the question to be subsequently raised by a pleader.

From their grounds of appeal to the Divisional Judge, it would appear that the vendees imagined that the first Court had set aside the sale of Wir Khan's share, but such is not the case. They still own his share and, if he wishes to have the sale set aside, he will have to sue them. Plaintiff was contented with the decree for the shares of Ahla and Ali, and on the appeal of the vendees he cannot get a decree for Wir Khan's share.

I accept the appeal and restore the decree of the First Court. Costs of the First Court to be paid as ordered by it. In the Divisional Court and in this Court, Ram Chand and Aya Ram, vendees, will pay plaintiff's costs. I make no order regarding the vendor's costs.

Appeal allowed.

No. 12.

Before Mr. Justice Reid.

APPELLATE SIDE. {

ABDUL RAHIM KHAN,—(PLAINTIFF),—APPELLANT,

*Versus*MUHAMMAD YAR AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 566 of 1897.

*Pre-emption—Fraudulent concealment of sale—Limitation Act, 1877,
Section 18, knowledge of facts, presumption as to.*

In a suit for pre-emption it appeared that the deed of sale, which was described in two places in itself as a mortgage deed, was dated 12th December 1876 and was registered on the same date at the *tahsil*, three or four miles from the village in which the land in suit was situate; that the marginal witnesses were residents of villages other than that in which the vendor and vendee resided and where the land was situate; that from 1876 till 1895 the vendee continued to be recorded, as before, as tenant of the said land; that on the 19th September 1894 a measurement clerk reported that a sale had taken place and that the vendee was in possession; that on the 1st October 1895 mutation of names was effected in the vendee's favour by order of the Tahsildar, and that the residents of the village in which the land was situate, as a body, were not aware of the sale. The plaint was filed in February 1896, concealment of the sale being therein alleged, and the pre-emptor, when examined before issues were framed, pleaded fraud by which he had been deceived. The first Court decreed the claim, finding that the fact of the sale became known to plaintiff on the 1st October 1895 and that there had been fraudulent concealment thereof, but the Divisional Judge, on appeal, dismissed the suit as barred by limitation, calculating either from the date of registration or from the 19th September 1894.

Plaintiff appealed to the Chief Court, and in addition to the facts above-mentioned, on which his allegation of fraudulent concealment was based, further urged in support of such allegation the fact that on the death of the vendor in 1881, his son was recorded as owner in his place.

Held, that though each of the facts above set forth, when taken alone, might be merely suspicious, yet when found to concur, they established fraudulent concealment within the meaning of Section 18 of the Limitation Act.

Held, further, that, fraudulent concealment having been established respondent upon whom the *onus* rested, had not proved that the appellant had knowledge of the sale more than one year before suit, which was therefore within time.

Further appeal from the order of R. L. Harris, Esquire, Divisional Judge, Derajat Division, dated 1st April 1897.

Oertel, for appellant.

Parkash Chand, for respondents.

The judgment of the Court was as follows :

REID, J.—The sole question for consideration is whether *4th Feby. 1898.* the suit for pre-emption was or was not time-barred when instituted on the 15th February 1896. The sale-deed in suit is dated 12th December 1876, and was registered on the same date at the *tahsil*, three or four miles from the village in which the land in suit is situate, the two marginal witnesses to the deed being residents of villages a mile and a half and three miles, respectively, according to the respondent from that village.

The sale-deed was described in two places, in itself, as a mortgage-deed, and from 1876 till 1895 the vendee continued to be recorded, as before, as tenant of the land in suit.

In 1894 or 1895—both dates are given in different proceedings—a measurement clerk reported that the vendee was in possession, and on the 1st October 1895 mutation of names was effected in his favour by order of the *Tahsildar*. In the plaint, filed $4\frac{1}{2}$ months after this mutation, concealment of the sale was alleged, and the pre-emptor, when examined before issues were framed, alleged fraud by which he had been deceived.

The Court of first instance decreed the claim, finding that “the fact of the sale became known on the 1st October 1895,” and finding that there had been fraudulent concealment of the sale.

From this decree the vendee and other defendants appealed, the sole point raised in appeal being limitation. The lower Appellate Court dismissed the suit, holding that it was barred by limitation, either calculating from the date of registration or from the 19th September 1894, when application for mutation was made by the vendee. It does not appear from the record, and nothing has been pointed out to me by the learned counsel for the respondents to show, that there was any application for mutation by the vendee on the 19th September 1894: that was the date of the report already referred to, which was in these words “a sale having taken place, the vendee has taken possession”: on this followed the order of the 1st October 1895.

The facts on which the allegation of fraudulent concealment is based are (1), the marginal witnesses to the deed are not residents of the village in which the land in suit is situate, and in which the vendor and vendee resided; (2)

the vendee remained recorded as a tenant, no mutation in his favour as proprietor being effected; (3) in 1881, when the vendor died, his son Isa was recorded as owner in his place; (4) the deed is described as a mortgage-deed; (5) residents of the village as a body were not aware of the sale. Reliance is placed on an unreported ruling of this Court, Civil Appeal No. 932 of 1894, for the proposition that these facts, which are established, constitute such fraud as would extend the period of limitation. Each of the facts, taken alone, might be merely suspicious, but when found to concur, specially having regard to the nature of the third fact, they establish fraudulent concealment within the meaning of Section 18 of the Limitation Act. The question remains, when the fraud first became known to the appellant. The lower Appellate Court fixes the date of knowledge as the 19th September 1895, possession on that date being presumable, but I am not satisfied that there was then any intimation to the appellant of the sale, which had been till then fraudulently concealed. In *Kshimbhoy Habibbhoy v. Turner*, 1. L. R., XVII B. (P. C.), 341, their Lordships of the Privy Council remarked: "Their Lordships consider that when a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud, and suing to recover the property, has had clear and definite knowledge of those facts, which constitute the fraud, at a time which is too remote to allow him to bring a suit." Fraudulent concealment being established, it has not, in my opinion, been established that the appellant had knowledge more than one year before the suit, which was, therefore, within time. I see no reason for differing from the finding of the Court of first instance, that time ran from the 1st October 1896. The only plea taken in appeal below being limitation, it is unnecessary to remand this case under Section 562 of the Code of Civil Procedure.

I decree the appeal and restore the decree of the Court of first instance, with costs in all Courts.

Appeal allowed.

No. 13.

Before Mr. Justice Chatterji and Mr. Justice Clark.

HAMIRA AND OTHERS,—(DEFENDANTS),—APPELLANTS, }

Versus

} APPELLATE SIDE.

SUNDAR,—(PLAINTIFF),—RESPONDENT.

Case No. 792 of 1895.

Custom—Succession—Legitimacy—Chaddar-andazi marriage, proof of.

Plaintiff claimed to succeed to part of the estate of one K., on the ground that he was the legitimate son of K. by one Mussammat R. D., who, he alleged, had been married by *chaddar-andazi* to K. after the death of her former husband, one M. Defendants denied that Mussammat R. D. had ever been married to K., and that plaintiff was K.'s son. It appeared that after the death of M., K. and Mussammat R. D. lived together, and were regarded by the *baradari* as man and wife, and that plaintiff after K.'s death was entered in the revenue records as K.'s son. The parties were residents of the Garshankar *tahsil*, Hoshiarpur District.

Held, that under the circumstances above mentioned it had been sufficiently proved that the ceremony of *chaddar-andazi* had actually been performed, and that, therefore, plaintiff was entitled to succeed as prayed.

Quære—Whether in the said district the ceremony of *chaddar-andazi* is necessary to validate marriage.

Further appeal from the order of C. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 10th April 1895.

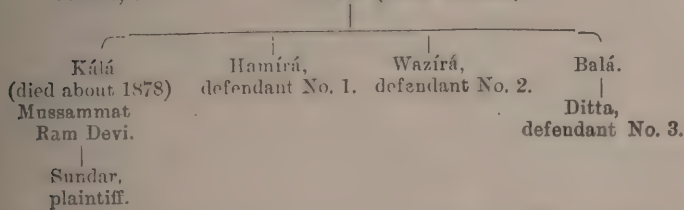
Jaishi Ram, for appellants.

The judgment of the Court was delivered by

CLARK, J.—

DAYA (DIED IN 1884).

7th Feby. 1898.



Plaintiff claims one-fourth of Dayá's estate according to above pedigree table.

Defendants deny that Mussammat Ram Devi was married to Kala, and that Sundar was Kalá's son.

The first Court found that even if Sundar was the son of Kala that there had been no *chaddar-andazi* between Kala and Mussammat Ram Devi, and, therefore, according to the *Riwaj-i-am*, he could not get the inheritance of Kala, and dismissed the suit.

Mr. G. W. Rivaz, Divisional Judge, held that there was not much reason for doubting that plaintiff was the son of Kala; he agreed with the first Court that plaintiff had failed to establish that any *chaddar-andazi* ceremony was gone through between Mussammatt Ram Devi and Kala, but held that Mussammatt Ram Devi stood in the position of a *karewa* wife to Kala for some years before his death, and that she was regarded as his wife in his village. He wished to ascertain whether the rule was as laid down in the *Riwaj-i-am*, and whether *chaddar-andazi* ceremony was necessary to make the marriage valid, and whether there were any instances of sons being excluded from inheriting because the *chaddar-andazi* ceremony had not been performed. He remanded the case under Section 566, Civil Procedure Code, for a finding on the following issues:—

(1).—Is plaintiff in fact the son of Kala?

(2).—If so, whether he is his legitimate son for the purpose of inheritance.

The Lower Court amplified these issues into five, of which one was whether *chaddar-andazi* had taken place, and referred the issues to a Local Commissioner.

The return of the Local Commissioner was to the effect that plaintiff was the legitimate son of Kala; that *chaddar-andazi* ceremony had taken place; that if the ceremony had not taken place plaintiff would not inherit by custom. He said there was only one—not well supported—instance of a son having been excluded for want of *chaddar-andazi* ceremony, and that in some cases sons had succeeded where there had been no *chaddar-andazi* ceremony between the parents.

Mr. Bird, Divisional Judge, accepted this report, held plaintiff to be the legitimate son of Kala, and decreed the claim.

Defendants appeal to this Court, and the first question for decision is whether *chaddar-andazi* ceremony took place between Kala and Mussammatt Ram Devi. It is clear that the two were regarded as man and wife in the village Soni, where they were living, and in the village Bagra, where defendants live. The villages are only $1\frac{1}{2}$ or 2 *kos* apart. Mussammatt Ram Devi's first husband, Makkan Singh, was dead before she began to live with Kala, so there was no obstacle to *chaddar-andazi*. Under these circumstances we do not think that it was necessary for the

ceremony to be very strictly proved, and we do not think the discrepancies pointed out by the first Court in the evidence of the witnesses are sufficient to discredit the witnesses.

They lived together as man and wife, were so treated by the *baradari*, and after Kala's death plaintiff was entered in the revenue records as Kala's son in village Soni.

We think the report of the Local Commissioner should be accepted that *chaddar-andazi* ceremony took place. Even if it did not, we do not think it is made out that the special custom regarding *chaddar-andazi* ceremony to validate marriage is in force in this district. *Punjab Record* No. 33 of 1896 and * No. 1298 of 1895 show that such ceremony is not generally necessary. There is no well-authenticated instance in which a son has been excluded for want of *chaddar-andazi* ceremony between the parents; and there are several instances where a man has taken his *bharjai* into his house without *chaddar-andazi* and the sons have succeeded: this is the allegation for the Garhshankar *tahsil* that *chaddar-andazi* is generally necessary, but may be dispensed with in the case of a *bharjai*; in the other *tahsils* *chaddar-andazi* is said to be necessary in all cases to validate the marriage.

It is, however, not necessary to come to a decision on this point in the case, as we hold that the *chaddar-andazi* ceremony took place in this case.

We dismiss the appeal with costs.

Appeal dismissed.

No. 14.

Before Mr. Justice Chatterjee and Mr. Justice Clark.

ABDUL KADIR,—(PLAINTIFF),—APPELLANT,

Versus

NUR-UD-DIN AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

CASE No. 35 of 1896.

Landlord and tenant—Right of landlord to claim rent from sub-lessee—Attornment by sub-lessee to stranger claiming title to property—Termination of tenancy—Punjab Tenancy Act, 1887, Section 58.

Held, that upon the determination of a tenancy, it is the duty of the tenant not merely to relinquish possession of the premises, but to restore possession thereof to the landlord, and that if such tenant has underlet the whole or any portion of the premises, he will be liable for a breach of the obligation if his sub-tenant refuses or neglects to give up possession when the term ends.

An attornment made by a tenant or a sub-tenant to a stranger claiming title to the estate of the landlord is absolutely null and void, and the possession of such landlord is in no way affected or changed thereby.

Held further, that there being no privity of contract between the original lessor and a sub-lessee, the former is not entitled to claim rent from the latter, his remedy being only against the lessee with whom he made the contract.

The provision in Section 58 of the Punjab Tenancy Act, 1887, is a special provision in a special enactment, and has no application to the ordinary law of landlord and tenant.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Delhi Division, dated 10th October 1895.

Madan Gopal, for appellant.

Beechey, for respondents.

The facts of the case fully appear from the following judgment delivered by

11th Feby. 1898. CLARK, J.—In 1888 plaintiff let the shop in dispute to defendant No. 1 for three years and put him in possession; the lease terminated on the 27th March 1891. On the 11th March 1891 defendant No. 1 renewed the lease for another three years from the 27th March 1891; the lease gave defendant No. 1 the power to sub-let, and he sub-let the shop to defendants Nos. 2 and 3, and let them into possession. When defendants No. 2 and 3 had been in possession for some four days a dispute arose between them and defendant No. 1. Defendant No. 1 under his lease was bound to pay plaintiff the whole three years' rent, Rs. 378, within one month, and he claimed three years' rent in advance from defendants Nos. 2 and 3; they were only willing to pay one year in advance (*vide* plea of defendants Nos. 2 and 3 in the ejectment case brought by plaintiff against them in 1891). While this dispute was going on, Karim Bakhsh, plaintiff's father-in-law, appeared upon the scene, and set up a claim to the shop. He said that plaintiff had given it and other property to his wife, Mussammat Rukia, deceased, that he was part heir of Mussammat Rukia, and that this shop had come to him as his share of her inheritance.

Thereupon defendants Nos. 2 and 3 attorned to Karim Bakhsh, and took a lease of the shop from Karim Bakhsh on 27th March 1891, and remained in possession thereof until the suit was filed on 16th January 1895.

Defendant No. 1 having on hand a dispute with defendants Nos. 2 and 3 about the rent, and seeing that Karim Bakhsh had come in as a claimant, and that defendants Nos. 2 and 3

had attorned to him, says he vacated the shop at the instance of plaintiff.

On 22nd April 1891 plaintiff sued defendants Nos. 2 and 3 for possession of the shop, under Section 9 of the Relief Act. Mr. Clifford held that plaintiff had put in defendant No. 1, and defendant No. 1 had put in defendants Nos. 2 and 3, and that their possession was plaintiff's possession, and that plaintiff could not sue for possession under Section 9 of the Relief Act and dismissed the suit.

On 12th August 1893 plaintiff sued defendant No. 1 for Rs. 378, three years' rent. *Rai Karam Chand*, Judge, Small Cause Court, dismissed the suit on the ground that plaintiff had not maintained defendant No. 1 in possession, as he was bound to under the lease.

On 16th October 1893 Karim Bakhsh sued defendants Nos. 2 and 3 for three years' rent, and obtained a decree from the Small Cause Court.

On 15th January 1895 plaintiff sued defendant Nos. 1, 2 and 3 for possession of the shop and rent for three years and eleven months, Rs. 550. The first Court decreed possession of the shop against all defendants, and for Rs. 493 damages for use and occupation against defendants Nos. 2 and 3.

The Divisional Judge reduced the damages to Rs. 10.

Plaintiff appeals and defendants file cross-objections.

The first question we have to ascertain is whether defendants Nos. 2 and 3 were at the time of the suit sub-tenants of plaintiff.

Defendants in their plea in the suit for rent brought against them by Karim Bakhsh denied that they were tenants of Karim Bakhsh, and pleaded that they were the tenants of defendant No. 1, who was the tenant of defendants Nos. 2 and 3.

Plaintiff certainly put defendant No. 1 in possession of the shop, and defendant No. 1 put defendants Nos. 2 and 3 in possession as sub-tenants; defendants Nos. 2 and 3 were therefore sub-tenants of plaintiff at the time of institution of the suit, unless for any reason the tenancy had terminated.

By the terms of defendant No. 1's lease he could not give up the shop at pleasure; if he lost the shop for any reason he could claim a refund of the rent from plaintiff (clauses 2 and 6 of the lease).

Nothing has been shown that would justify defendant No. 1 in giving up the shop; he had been let into possession by plaintiff and he had let defendants Nos. 2 and 3 into possession; it is not shown that plaintiff agreed to defendant No. 1's giving up the shop, nor that his possession had been seriously attacked.

Defendants Nos. 2 and 3 never lost possession; the fact that they attorned to Karim Bakhsh would not terminate their tenancy.

Under English law such an attornment would be null and void. Foa in his *Law of Landlord and Tenant*, 2nd Edition, 1895, page 355, says that the effect of Statute II George 2, C. 19, S. 11, is—"that all attornments made by tenants to "strangers claiming titles to the estates of their respective land- "lords shall be absolutely null and void to all intents and "purposes whatsoever, and the possession of such landlords "not deemed to be in any way affected or changed thereby."

"Mere relinquishment of possession by the tenant.....
".....is not sufficient, there must be acceptance of the
"possession by the landlord."—Foa, page 502.

"The duty of the tenant upon the determination of the
"tenancy in one of the modes already explained is simply to
"yield up peaceable and complete possession of the premises
"devised to him.....This duty will be implied in law
"if not expressed in the contract between the parties, and
"the tenant will not discharge it by merely going out of
"possession unless he restore possession to the landlord.
"It follows that if he has under-let the whole or any portion
"of the premises, he will be liable for a breach of the
"obligation if his sub-tenant refuse or neglect to give up
"possession when the term ends."—(Foa, page 587.)
There was no action on the part of defendants Nos. 2 and 3 which terminated their tenancy from defendant No. 1, nor was there any action on the part of defendant No. 1 which terminated his tenancy from plaintiff. Even if defendants Nos. 2 and 3 had terminated their tenancy from defendant No. 1, this would not have terminated defendant No. 1's tenancy from plaintiff.

We hold then that at the time of the institution of this suit, defendant No. 1 was the tenant of plaintiff, and defendants Nos. 2 and 3 were the tenants of defendant No. 1. Neither had the tenancy of defendants Nos. 2 and 3 under defendant No. 1 nor the tenancy of defendant No. 1 under plaintiff been terminated.

The question then arises whether plaintiff can claim rent from the sub-tenants.

There is no privity of contract between plaintiff and the sub-tenants, and on general principles plaintiff is not entitled to claim rent from the sub-tenants; he must look to his tenant with whom he made the contract.

The authorities are all to the same effect. Williams on Real Property says:—"Every under-lessee becomes tenant to the lessee who grants the under-lease, and not tenant to the original lessor. Between him and the under-lessee no privity is said to exist. Thus the original lessor cannot maintain any action against an under-lessee for any breach of the covenants contained in the original lease. His remedy is only against the lessee" (13th Edition, page 408). Woodfall's Law of Landlord and Tenants, 8th Edition, page 13, says:—"The under-lessee is not liable to the original lessor for the rent and covenants in the original lease."

Foa, page 114, says:—"No action will lie upon a covenant unless there be privity of estate between the parties, hence in the case of an under-lease, the under-lessee cannot be sued in an action for breach of covenant by the original lessor, even though the rent by such under-lease be made payable to the latter."

In answer to this it is argued by plaintiff's counsel that the Indian law is different from the English law, and reliance is placed upon Section 58 of the Punjab Tenancy Act and XIV W. B., 273.

We do not think there is any reason for holding that the principles of the English law on this subject are not the same principles which govern the Indian law.

The provision in the Punjab Tenancy Act, putting the sub-tenant in the same position as regards the landlord as the tenant, is a special provision in a special enactment. The fact of its being specially provided in this case suggests that the general law is different. The *Weekly Reporter* case refers to an assignee, not to a sub-tenant, and is not in point.

We hold then that plaintiff can make no claim for rent against defendants Nos. 2 and 3, sub-tenants; his claim lay against defendant No. 1, his tenant.

Unfortunately for plaintiff his claim against defendant No. 1 is now entirely out of Court. It was dismissed by the Judge of the Small Cause Court in 1893, and has again been

now dismissed by the first Court in this case, and plaintiff has not appealed from that decision.

Holding as we have done that defendants Nos. 2 and 3 are sub-tenants and not assignees or trespassers, it is unnecessary for us to discuss the arguments addressed to us by plaintiff's counsel to show that they were liable to plaintiff as assignees or trespassers.

In the cross-objections by defendants Nos. 2 and 3 it is urged that plaintiffs wrongly filed Court-fees for possession of the shop on the value of Rs. 2,000, whereas they should have been filed only on the value of the tenancy, and that defendants Nos. 2 and 3 cannot, however the case may go, be made to pay excess Court-fees wrongly paid by plaintiff.

I. L. R., XV *All.*, 63, is relied upon to show how the Court-fees should have been calculated.

Without coming to any decision as to what Court-fees should have been paid by plaintiff, we think the matter was so doubtful that plaintiff should not in any case be held responsible for excess Court-fees, because he did not follow the Allahabad ruling.

We dismiss plaintiff's appeal, and accept defendants' cross-objections so far as to dismiss the claim for rent or damages altogether; the result is that only the decree for possession stands.

As regards costs, plaintiff has been seeking diligently and honestly for his just rights from the commencement, though he has not threaded his way successfully through the meshes of the law. Defendants Nos. 2 and 3, on the other hand, have been faithless and dishonest throughout. They appear after having got the shop from defendant No. 1 to have refused to pay him the rent agreed upon; they then entered into an arrangement with Karim Bakhsh to defeat plaintiff's claim. When Karim Bakhsh sued them, they played plaintiff off against him, and now that plaintiffs have sued them, they play Karim Bakhsh off against plaintiffs.

We direct that defendants Nos. 2 and 3 pay plaintiff's costs throughout.

Appeal dismissed in part.

No. 15.

Before Mr. Justice Reid.

NIDHU,—(PLAINTIFF),—APPELLANT.

*Versus*NIHALA AND OTHERS,—(DEFENDANTS)—
RESPONDENTS.

Case No. 1313 of 1897.

Appeal from order of Appellate Court returning plaint for amendment or for presentation to proper Court—Civil Procedure Code, 1882, Sections 53, 582, 588 (6).

Held, following I. L. R., III All., 456, that an order of an Appellate Court returning a plaint for amendment or for presentation to the proper Court is not appealable under Section 588 (6) of the Civil Procedure Code, that clause being applicable only to orders passed by Courts of first instance.

Further appeal from the order of Captain C. S. Martindale, Divisional Judge, Hoshiarpur Division, dated 31st August 1897.

Jaishi Ram, for appellant.

Madan Gopal, for respondent.

The judgment of the learned Judge was as follows:—

REID, J.—A preliminary objection has been taken by the learned counsel for the respondents that the order appealed from, if it be treated as passed under Sections $\frac{53}{582}$ of the Code of Civil Procedure is not appealable, under Section 588 (6) of the Code, and reliance is placed on *Bindeshri Chaubey v. Nandu*. *I. L. R., III All., 456.*

In that case it was ruled that Section 588 (6) relates to orders returning plaints for amendment, or to be presented to the proper Court, passed by a Court of first instance, and not to a decision of an Appellate Court upon an appeal to it against the judgment of a Court of first instance on general grounds.

For the appellant it is argued that the order must be treated as being under Section 562 of the Code, having regard to the provisions of Section 564. The order is obviously not under Section 562, and *Lingammal v. Chisma Venkatammal*, *I. L. R., VI Mad., 239*, is authority for holding that a Court of appeal may return a plaint for amendment.

I see no reason to differ from the learned Judges of the Allahabad Court, who ruled that the proper course for the appellants to pursue was to file an appeal from the decree of

} APPELLATE SIDE.

the Lower Appellate Court. I dismiss this appeal with costs, and direct that the memorandum of appeal be returned to the appellant to be filed as an appeal from the decree of the Lower Appellate Court upon payment of the requisite Court-fees. Fees for appellant's counsel will be sixteen rupees.

Appeal dismissed.

No. 16.

Before Mr. Justice Reid.

MR. BEVAN PETMAN,—(DECREE-HOLDER),—APPELLANT

*Versus*MAJOR H. L. RAMSAY,—(JUDGMENT-DEBTOR),—
RESPONDENT.

} APPELLATE SIDE.

Case No. 1398 of 1897.

Sale of share of residential house by one of four Hindu co-sharers—House occupied by tenant—Right of vendee to joint physical possession—Civil Procedure Code, 1882, Section 263.

Appellant purchased from one of four Hindu brothers his share, being one-fourth of a dwelling-house in the Civil Lines, Rawalpindi, which had for some years previously been rented, for residential purposes, by the Political Officer for the time being with *Sardar Ayub Khan*. It appeared that the appellant wished to occupy the whole house, and purchased the share of his vendor, but was unable to come to terms with the three other co-sharers. The respondent, tenant of the house, originally from all the four co-sharers, and finally from three of them, having refused to vacate any part of it, appellant filed a suit against him and his three lessors for "joint possession of one-fourth share of the said house, Rs. 260 arrears of "rent and costs," and on the 19th November 1897 obtained a decree against respondent "for possession of a joint quarter share and for Rs. 60 rent and "for costs." Subsequently appellant applied for execution of the said decree, and prayed that "possession of a one-fourth share of a house "situate in the Civil Lines, in which the judgment-debtor lives, be given." This application having been dismissed on the ground that an order for physical possession, if passed, could not be carried out, having regard to the fact that the respondent was in possession as tenant of a majority of the co-sharers, the decree-holder appealed to the Chief Court.

Held, that appellant having confined his application to physical possession of the house in suit, and having refused to accept possession through receipt of rent, the application had been rightly rejected, on the ground that, the house having been enjoyed by the co-sharers only through receipt of rent, it was not open to one co-sharer to transfer to his vendee the right to interfere with the rights of the other co-sharers in such a manner as to deprive them of the enjoyment of their shares in the joint property.

First appeal from the order of C. L. Dundas, Esquire, District Judge, Rawalpindi, dated 29th November 1897.

Beechey, for appellant.

H. Rattigan, for respondent.

The judgment of the learned Judge was as follows:—

REID, J.—The petitioner purchased from one of four 8th Feby. 1898.
brothers his share, being one-fourth of a dwelling-house in the Civil Lines, Rawalpindi, which had for four or five years been

rented, for residential purposes, by the Political Officer for the time being with *Sardar Ayub Khan*.

From the evidence on the record of the suit, in which the decree of which execution is now sought was passed, it appears that the petitioner wished to occupy the whole house, and purchased the share of his vendor, but was unable to come to terms with the other three co-sharers.

The respondent, tenant of the house, originally from all the co-sharers, and finally from three of them, having refused to vacate any part of it, the appellant filed a suit against him and his three lessors for "joint possession of one-fourth share of the said house and Rs. 260 arrears of rent, and costs." On the 19th November 1897 the appellant obtained a decree "against defendant No. 1 for possession of a joint quarter share and for Rs. 60, rent and for costs." From this decree the respondent filed an appeal which is pending in this Court.

The appellant applied for possession, in execution of this decree, and the order now appealed against was passed on the 29th November 1897, dismissing the application and refusing execution on the ground that an order for physical possession, if passed, could not be carried out, having regard to the fact that the respondent was in possession as tenant of a majority of the co-sharers. On the 30th November 1897 the appellant applied "under Section 396 of the Code of Civil Procedure for the issue of a commission to partition the property in dispute, on the ground that the respondent refuses to come to any reasonable compromise, and provision is made in the Code to meet the difficulty arising in the case."

Notice was issued to show cause on the 15th December why this application should not be granted, and on the 18th December an adjournment was allowed till the 5th January 1898 to enable the majority of the co-sharers to file a suit for pre-emption against the appellant. On the date fixed an order was passed that the application for partition stand over till the pre-emption case, filed in the interval, comes on for hearing. Objections to the application for partition, dated the 4th December, were filed by the respondent.

It was suggested at the hearing by the learned counsel for the respondent that the vendor and his co-sharers were members of a joint Hindu family. Had this been the case, the co-sharers could have set aside the transfer by the vendor instead of filing a suit or pre-emption, and there was no allegation to this effect below. For the purposes of this appeal it

must be assumed that the parties were co-sharers, though not members of a joint Hindu family, no partition by metes and bounds having been effected. The learned counsel for the appellant quotes (1) *Koonwar Bijoy Keshub Roy Bahadur v. Shama Soonduree Dossee*, 2 W. R., Misc., 30; (2) *Brohmo Moyee Debia v. Raj Chunder Roy*, 5 W. R., Misc., 15; (3) *Ranee Shama Soonduree Debia v. Jardine, Skinner & Co.*, 7 W. R., 376; (4) *Nundul Lal v. Lloyd*, 22 W. R., 74; (5) *Lloyd v. Mussammat Bibee Sogra*, 25 W. R., 313; (6) 21, *Punjab Record*, 1867; (7) 31, *Punjab Record*, 1887; (8) *Rajendro Lall Gossami v. Shama Charan Lahori*, I. L. R., V Calc., 188; (9) *Divarka Nath-Rai v. Kali Chundur Rai*, I. L. R., XIII Calc., 75; (10) *Chuni Singh v. Hira Mahata*, IX Calc., L. R. (F. B.), 37; and Section 263 of the Code of Civil Procedure for the proposition that the appellant is entitled to joint physical possession of the house in suit with the respondent, and that, until partition, he is entitled to go into each and every room in the house at his pleasure.

The learned counsel for the respondent relies on (1) *Mohabeer Pershad v. Ramyad Singh*, 20 W. R., 192; (2) *Deendyal Lal v. Jagdip Narain Singh*, I. L. R., III Calc., (P. C.), 198; (3) *Watson and Co. v. Ram Chand Dutt*, I. L. R., XVIII Calc., (P. C.), 10; (4) *Lachmeswar Singh v. Manowar Hossein*, I. L. R., XIX Calc. (P. C.), 253; (5) *Rama Nand Singh v. Gobind Singh*, I. L. R., V All., 384; (6) *Chander Kishore v. Dampat Kishore*, I. L. R., XVI All., 369; (7) *Venkatarama v. Meera Labai*, I. L. R., XIII Mad., 275; (8) *Rangasami v. Krishnayyan*, I. L. R., XIV Mad., 408; (9) *Balkrishna v. Moro*, I. L. R., XXI Bom., 154; (10) *Gurlingapa v. Nandapa*, I. L. R., XXI Bom., 797, and Mayne's *Hindu Law*, Edition 4, Section 329. The authorities relied on for the respondent are nearly all concerned with alienations by members of a joint Hindu family, but principles are laid down which are applicable to the present case. In (2) their Lordships of the Privy Council remarked, "It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share, so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold with the right to have the partnership accounts taken in order to ascertain and realise its value." Their Lordships remarked further that this principle might be applied to shares in a joint and undivided Hindu estate, if the

right of the purchaser were limited to that of compelling the partition, which the co-parcener, whose interest he purchased, might have compelled. In (8) this principle was applied by a Division Bench of the Madras Court, which gave the purchaser the money value of the share purchased by him in a house, instead of the share of the house itself. In (7) it was held that the purchaser of a co-parcener's share can take no higher right than his vendor possesses, and that is not a right to a certain share in each particular item of the family property, but a joint right with the other co-parceners to the ownership and enjoyment of each individual item, with an incidental right to obtain a partition of the whole family property, and have his share therein made over to him after due provision for the family debts and liabilities. In (4) their Lordships of the Privy Council referred to (3) as authority for the position that the Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners though they will do so in proper cases. Their Lordships held that where joint property is used by one co-sharer consistently with the continuance of the joint ownership and possession, without exclusion of the co-sharers who do not join in the special use, there is no encroachment on the rights of any of them, as regards common enjoyment, so as to give a ground of suit.

In (9) a *dictum* of Westropp, C. J., in *Balaji v. Gopal, I. L. R., III Bom., 23*—"If any one of several tenants in common, "joint tenants, or co-parceners, who is not acting by consent "of the others as manager of an estate, is to be at liberty to "enhance rent or eject tenants at his own particular pleasure, "there manifestly would be no safety for tenants, and it would "be impossible for them to know how to regulate their conduct "or whom to regard as their landlord"—was approved, and it was treated as settled law that a co-sharer who is manager, even with the consent of his co-sharers, cannot maintain a suit by himself and in his own name to eject a tenant, who has failed to comply with a notice calling on him to pay enhanced rent, and in (10) it was held by a Division Bench of the Bombay Court that the purchaser of the interests of a Hindu co-parcener stands in no better position than his vendor.

Of the authorities relied on by the learned counsel for the appellant, in (1) a Bench of the Calcutta Court held, by a majority of four to one (*Kemp, J.*), that an auction purchaser of the share of a joint undivided Hindu property, including

a dwelling-house, was entitled to be put into actual possession of a portion of the house.

In (2) it was held that a co-proprietor in a *taluk* is entitled to partake in the joint possession of all the land held *khas* by the co-sharers, or which would be so held by them if they had not leased it to tenants. The Court declined to decide what the rights of the co-proprietor were in respect of houses built on such land.

In (3) it was held that of so much of a share decreed as was in *khas* possession of co-sharers, physical possession should be given under Section 223, Act VIII of 1859, while of so much as was in possession of tenants formal possession should be given under Section 224 of the Act.

In (4) it was held that, where land is held in joint proprietorship, an action to recover it from a stranger, who is in wrongful possession, must be brought in the name of all the proprietors jointly, and that one shareholder alone, or his assignee, cannot claim to cultivate any portion of the property which is not in his *zera'it* without the consent of the other sharers, merely on the ground that he is willing to pay a reasonable rent for it.

In (5) it was held that, though a suit for partition is the best means of settling difficulties between co-sharers who will not agree, every co-sharer in an estate is entitled to joint possession with every other co-sharer, and is entitled to prevent anyone not having a right to occupancy from cultivating any portion of the land contrary to his wishes.

In (6) it was held that the owner of a fourth share in a piece of building land was entitled, as against persons who had built on the land with consent of the proprietors of a half share, to possession of his share on paying compensation to the builders.

* In (7) it was held that where a decree for partition failed to specify the actual parcels of land to be assigned to each sharer, such assignment might be effected in execution proceedings.

In (8) it was held that one of several co-proprietors has no right to take exclusive possession of any portion of the co-proprietary land without the consent of the other co-proprietors.

In (9) it was held that where several co-sharers have served a joint notice to quit, upon which notice they jointly institute a suit for recovery of the land, the fact that one of the

plaintiffs withdraws from the suit will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land, and in (10) it was ruled by a majority of three to two that co-sharers who wish to eject a tenant may do so, making co-sharers who decline to join in the suit defendants. The minority held that the remedy was by partition.

The appellant's counsel further relies on a judgment of this Court in Civil Revision No. 442 of 1895, which is inapplicable, the obstructor not being the judgment-debtor, and the Court holding that Section 335 of the Code of Civil Procedure applied. The owner of one-third of the house, of which two-thirds had been sold in execution of a decree, locked it up and would not allow possession to be taken. The house was not occupied by a tenant, or as far as can be gathered from the record by any one.

The relief sought in the application for execution was as follows :—"That possession of a one-fourth joint share of a "house situate in the Civil Lines, in which the judgment-debtor lives, be given."

Reading the decree and the application for execution together, I see no reason why execution should not have been effected by giving possession through receipt of rent jointly with the other three co-sharers. The decree included an award of rent for two months at the rate of thirty rupees per mensem, the rent payable to each of the co-sharers. In any event it was open to the appellant to apply for amendment of the decree.

On the facts, the authorities quoted and the law applicable, I have arrived at the conclusion that the lower Court was justified in refusing the relief sought at the argument before it, joint physical possession of the house in suit. The house was enjoyed by the co-sharers only through receipt of rent, and one co-sharer could not transfer to his vendee the right to interfere with the rights of the other co-sharers in such a manner as to deprive them of the enjoyment of their shares in the joint property. It is obvious that such enjoyment as was sought by the appellant would very materially reduce the value of the property of his co-sharers, and very possibly have the effect of depriving them of the rent for which the property had been acquired by them or their ancestor. For the appellant it has been argued that, inasmuch as he would be entitled on partition to be put in physical possession of a defined one-fourth part of the house, he is now entitled to joint physical possession of the whole. The rights of the parties on partition are

not now before me, it is sufficient to remark that a Court might possibly award the appellant, or the other co-sharers, the value in money of the share or shares left in possession of a sharer or sharers. It does not necessarily follow that each co-sharer would be put in physical possession. Section 250 of the Code gives a Court discretion to refuse execution and, inasmuch as the applicant in the Court below and in this Court confined his application to physical possession of the house in suit, the suggestion that possession should be through receipt of rent being strenuously opposed by his counsel, the Court below was justified in treating the application before it as being for physical possession only, and in rejecting that application.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 17.

Before Mr. Justice Chatterji and Mr. Justice Clark.

TARA SINGH,—(DEFENDANT),—APPELLANT,

Versus

SOHNU SHAH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1099 of 1895.

Contract Act, 1872, Section 52—Reciprocal promises—Written contract—Extraneous consideration.

Plaintiff had a money decree against one L. S., *jagirdar* of Majra, and had possession of the village, the revenue being then payable in kind, by virtue of a *patta* from the said L. S. On the 30th May 1891, the latter granted a lease of his *jagir* rights for twenty years to his son, R. D., and the defendant, T. S., in equal shares, stipulating to receive Rs. 500 a year from them, and they, in their turn, undertaking to pay Rs. 225 annually on account of cesses and the *nazrana* due to Government from the *jagirdar* into the *tahsil*. Of the balance Rs. 275, one-half was to be paid by the lessor to R. D., and out of the other half the defendant, T. S., was to pay Rs. 100 annually to the plaintiff in liquidation of his decree against the lessor, and Rs. 37-8-0 to the lessor himself. On the 31st May 1891 T. S. executed the bond, now sued upon, in favour of plaintiff, whereby he agreed to pay the amount of the plaintiff's decree, which was fixed at Rs. 1,400, in yearly instalments of Rs. 100 each, payable before *Jeth* each *Sambat* year from 1948. In case of default, the whole amount due at the time was to be realizable at once. On the said date plaintiff wrote a document (called a receipt) in favour of T. S. and R. D., by which he declared that he had given up possession of the village which he had been holding under the *jagirdar's patta*, and stipulated that he would pay the revenue due on account of the lands held by him, as owner or mortgagee, to them. Plaintiff having sued to recover Rs. 1,250 on the bond upon the allegation that T. S. had paid him Rs. 150 only of the stipulated instalments and had failed to pay the rest, T. S. pleaded that the consideration for the bond, *viz.*, the lease of

his *jagir* by L. S., had failed as it was incapable of enforcement, and that plaintiff by his own conduct, in paying the *jagir* dues to L. S. contrary to his agreement, was precluded from suing on the bond. It was proved that plaintiff had paid the revenue of his lands direct to L. S. since *Rabi* 1892, and not to the lessees as agreed upon, and that T. S. had realized *balai* for *Kharif* 1891. The first Court accepted T. S.'s plea and dismissed the claim so far as it was based on the bond, but the Divisional Judge, on appeal, decreed plaintiff's suit in full on the ground that the bond was an independent contract, the consideration being the release of L. S. from his liability under the decree. T. S. appealed to the Chief Court.

Held, upon the facts as above stated, that the contract between plaintiff and T. S. was contained in the bond and the so-called receipt read together, and not in the bond alone, and that plaintiff's failure to pay the *jagir* dues to T. S. and R. D., as he had agreed to do, was a sufficient ground for T. S. avoiding his contract as contained in the bond.

The consideration for a contract is extraneous to its terms, and there is no legal objection to proof being given that the recital of the consideration in a written contract is incomplete, or is in reality something different.

Further appeal from the order of Rai Bahadur Lala Buta Mal, Divisional Judge, Amritsar Division, dated 19th June 1895.

Duni Chand, for appellant.

Jaishi Ram, for respondent.

The judgment of the Court was delivered by

7th Feby. 1898.

CHATTERJI, J.—The material facts are shortly these. The plaintiff had a money decree against one Mian Lachman Singh, *jagirdar* of Majra, and had possession of the village, the revenue being then payable in kind, by virtue of a *patta* from Lachman Singh. On 30th May 1891 Lachman Singh granted a lease of his *jagir* rights for twenty years to his son, Ram Das, and the defendant, Tara Singh, in equal shares, stipulating to receive Rs. 500 a year from them. The lessees undertook to pay Rs. 225 annually on account of cesses and the *nazrana* due to Government from the *jagirdar* into the *tahsil*. Of the balance, Rs. 275, one-half was to be paid to the lessor by Ram Das, and out of the other half the defendant, Tara Singh, was to pay Rs. 100 annually to the plaintiff in liquidation of his decree against the lessor, and Rs. 37-8-0 to the lessor himself. On 31st May 1891 Tara Singh, clearly in pursuance of this arrangement, executed the bond sued upon in favour of plaintiff, whereby he agreed to pay the amount of the plaintiff's decree, which was fixed at Rs. 1,400, in yearly instalments of Rs. 100 each, payable before Jeth each *Sambat* year from 1948. In case of default the whole amount due at the time was to be realizable at once. On the same date the plaintiff wrote a document called a receipt in

favour of the defendant and Ram Das, by which he declared that he had given up possession of the village, which he had been holding under the *jagirdar's patta*, and further stipulated that he would pay the revenue due on account of the lands held by him as owner or mortgagee to them.

Plaintiff has now sued for recovery of Rs. 1,250 on the bond alleging that Tara Singh had paid him only Rs. 150 on account of the stipulated instalments and failed to pay the rest. There is a small claim also on a book account, but it is not in dispute before us.

Defendant's plea is that the consideration for the bond, which was the lease of his *jagir* by Lachman Singh, had failed as it is not capable of enforcement, and that plaintiff, by his own conduct in paying the *jagir* dues to Lachman Singh, contrary to his agreement, is precluded from suing on the bond.

The first Court, the District Judge of Gurdaspur, held that the plaintiff was barred from realizing the amount of the bond, unless he paid the revenue of his lands to the defendant, and dismissed this portion of the claim. The Divisional Judge, however, decreed it, on the ground that the bond was an independent contract, and that the consideration was the release of Lachman Singh from his liability under the decree.

The plaintiff admitted before the District Judge that he had paid the revenue of his lands direct to the *jagirdar* since *Rabi* 1892, though he had agreed to pay it to the lessees. Defendant stated that he had realized *batai* for *Kharif* 1891, and this appears not to have been denied by the plaintiff.

It is unnecessary to go into the question whether the terms of the so-called receipt as regards payment of revenue to the lessees of the *jagir* can be separately enforced. The defendant urges that it is unenforceable, and there was no serious argument on the respondent's part controverting this position. Whatever may be the merits of this question, if the plaintiff's promise formed the consideration for that of the defendant to pay Lachman Singh's debt, the plaintiff's failure to keep it may be a sufficient ground for avoidance of the latter's contract. The point for decision then is whether the parties' respective promises can be said to be mutually so connected.

The bond sued upon makes no reference to payment of revenue by plaintiff to the defendant, but merely stipulates that defendant will pay Lachman Singh's debt in certain instalments. But the receipt also is dated the same day, and the

plaintiff, who was the previous lessee of the *jagir*, surrendered possession by it to the new lessees. The lease to Tara Singh had for its avowed object the liquidation of plaintiff's decree against Lachman Singh. It is beyond doubt that plaintiff knew the contents of the lease, and it cannot be believed as his counsel evidently meant to insinuate by his argument, that plaintiff is a resident of a different village to that leased to defendant, that he had no previous knowledge whatever of the lease, or even that he gave up possession on its being shown to him for the first time when the receipt was drawn up. It is clear that all the documents are intimately connected together, and that they relate substantially to transactions which had all a common purpose, *viz.*, the payment of Lachman Singh's debt to plaintiff. One of these was the lease of the *jagir* to defendant and Ram Das in place of the plaintiff, another the realization by the lessees under the condition of the lease of the revenue payable by the plaintiff to the *jagirdar*, and the third the taking over of Lachman Singh's debt to plaintiff by the defendant. The illustration given by the Divisional Judge for holding the view that the consideration for defendant's promise is the discharge of the original debt, is not in point, for he has made no reference to the plaintiff's contemporaneous promise in writing to pay the revenue to the defendant. The latter promise is the substantial consideration, and no other satisfactory explanation for defendant taking Lachman Singh's liabilities on himself has been advanced. It is probable that the parties acted on the agreement in the receipt before Rabi 1892, and this also supports our view. Moreover, it would seem right to hold that the contract between the plaintiff and the defendant is contained in the receipt and the bond, and not in the latter alone.

The consideration for a contract is extraneous to its terms, and there is no legal objection to proof being given that the recital of the consideration in the written contract is incomplete, or that the real consideration was something different: (*Hukam Chand v. Hira Lal*, I. L. R., III Bom., 159; *Vasudeva v. Narasamma*, I. L. R., V Mad., 6 at page 8; *Kumara v. Srinivasa*, I. L. R., XI Mad., 213). Moreover no such objection was urged by counsel before us at the hearing, and the bond itself does not actually recite that the consideration was the mere discharge of Lachman Singh from his liabilities to the plaintiff.

We hold, therefore, that the real consideration for defendant's promise was the plaintiff's promise to pay the revenue of

the lands held by him in Majra to the former and his co-lessee. It is proved that the plaintiff holds more than three-fourths of the village and pays Rs. 335-14-0 as revenue out of a total of Rs. 412, payable to Lachman Singh. The amount of revenue payable by the plaintiff is, however, really immaterial for purposes of this case.

Reading the bond and the receipt together, the case appears to us to stand thus—the plaintiff agreed to pay the revenue payable by him to the defendant and his co-lessee, who were to receive it in equal shares, and defendant, in consideration thereof agreed to pay Lachman Singh's debt to plaintiff in annual instalments of Rs. 100 each. The parties made a set of reciprocal promises to each other and, having regard to the circumstances of the case, the fact that the defendant is no relation of Lachman Singh, and that the object of the latter's lease of the *jagir* rights was to induce the defendant to take over the liability to plaintiff on himself, we are of opinion that it was understood that plaintiff's promise was to be fulfilled first. As he has broken his promise the defendant is not bound to perform his, and the penal clause in the case of default cannot take effect, Section 52, Contract Act. The first Court, therefore, was right in dismissing this part of the plaintiff's claim.

We restore the decree of the District Judge with costs in this and in the Divisional Court.

Appeal allowed.

No. 18.

Before Mr. Justice Chatterji and Mr. Justice Clark.

BELI RAM,—(PLAINTIFF),—APPELLANT.

Versus

CHUHA RAM AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 113 of 1896.

Mortgagor and mortgagee—Compensation for improvements by mortgagee, Regulation XVII of 1806.

In 1872 plaintiff's father mortgaged a certain house to defendants' father and made over possession thereof to the latter. The mortgage deed provided that the property should be redeemed within one year on payment of Rs. 900 principal and Rs. 7 on account of costs of a suit, the decree in which, in favour of defendants' father, formed the consideration for the mortgage. In default, it was provided that the mortgage should become a sale. The deed made no provision as regards the mortgagee's right to make repairs or improvements. The evidence established

that the house at the time of mortgage was a *kacha* one, and that some seventeen years before suit it actually fell down owing to this cause, and was rebuilt by the mortgagee, without any objection on the part of plaintiff who was living in the neighbourhood, in a more substantial condition. Plaintiff having sued for redemption, defendants pleaded that the mortgage had under the terms of the deed become a sale, and that, in any event, plaintiff could not redeem the property without paying for the improvements effected thereto. The lower Court decided against defendants on both points, and they appealed to the Divisional Court, but only on the ground that they were entitled to compensation. The Divisional Judge found that defendants were entitled to Rs. 429-10-0 as compensation out of the Rs. 1,200 claimed by them. On appeal to the Chief Court, it was

Held, that the mortgagee had a right to re-build the house in order to keep up his security, and in rebuilding it was authorised to make it more substantial, provided the work was done providently and without any unnecessary expense, and that the mortgagee was, therefore, entitled to be recouped for the outlay, which was under the circumstances a reasonable one, to the extent that the mortgagor would derive benefit therefrom.

Found, on the evidence, that the amount decreed by the Divisional Judge as compensation was proper and reasonable.

Further appeal from the order of G. L. Smith, Esquire, Divisional Judge, Mooltan Division, dated 13th December 1895.

Lal Chand, for appellant.

Sham Lal, for respondents.

The judgment of the Court was delivered by

12th Feby. 1898.

CHATTERJI, J.—The facts are given in the judgment of the Court of first instance. The dispute now is about the right of the mortgagee to compensation for improvements. Parties have filed cross appeals, plaintiff contending that the mortgagee is entitled to nothing, and the latter that he has been allowed too little by the Divisional Judge.

There appears to be no dispute that the house has been actually rebuilt by the defendants. The plaintiff says it was unnecessarily rebuilt, but the old structure was mostly if not wholly a *kacha* one, and liable to tumble down in case of heavy rain and required a considerable outlay each time for repairs. It is fairly proved that it fell down owing to this cause some sixteen or seventeen years before the institution of the suit. That being so, the mortgagee had the right to rebuild it in order to keep up his security, and in rebuilding he was authorised to make it more substantial provided the work was "done providently and no new or expensive buildings were erected for purposes different from those for which the former buildings were used," (Fisher on *Mortgages*, 4th Edition, page

865). It is not contended that the reconstruction by the mortgagee is open to any of the above objections, and it is admitted before us that, as a result of the improvement, the rent has increased and is now Rs. 5 a month, the benefit of which will accrue to the mortgagor on redemption. The case is thus more analogous to No. 67, *Punjab Record*, 1893, and distinguishable from No. 67, *Punjab Record*, 1896. We hold that the outlay was a reasonable one, and that the mortgagee is entitled to be recouped for it, at least to the extent the mortgagor will derive benefit from it. Moreover plaintiff was admittedly living at no great distance from the house, and made no objection, which not only precludes him from putting forward his present contention under the circumstances of this case, but clearly shows that the expenditure was reasonable and necessary.

There is considerable force in the Divisional Judge's reasoning, based on No. 123, *Punjab Record*, 1888, that the mortgagee *bonâ fide* believed himself to be the owner, as the time for redemption had expired, and, under the terms of the deed of mortgage, after the lapse of the period fixed, the plaintiff's right of redemption was lost. Regulation XVII of 1806 was declared to be in force in the Punjab by Act IV of 1872, on 28th March 1879, after the execution of the deed, and it was disputed until the doubt was set at rest by No. 117, *Punjab Record*, 1885, that it was applicable to house property. But this discussion need not be carried further, as even as a mortgagee, the defendant is entitled to compensation for an improvement of the character he has made in this case.

As regards the amount of compensation, we do not see sufficient ground for differing from the finding of the Divisional Judge. The defendant evidently claimed too much, while the value of the new structures was differently estimated at Rs. 424 and Rs. 591 by two qualified persons in the Court of first instance, and at Rs. 429-10-0 by the commissioner appointed by the Divisional Judge. The actual outlay incurred by the defendants can only be matter of guess, and it is difficult to come to a valuation of the improvements at the time of suit regarding which there would not be room for some difference of opinion. We think all the circumstances considered, the value allowed by the Divisional Judge is not excessive but proper and reasonable.

We therefore dismiss the appeal and the cross appeal, and leave the parties to bear their own costs in this Court.

Appeal dismissed.

No. 19.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Stogdon.

APPELLATE SIDE. }

RAMSUKH DAS,—(DEFENDANT),—APPELLANT,

Versus

FAZAL-UD-DIN AND OTHERS,—(PLAINTIFFS AND DEFENDANTS),—RESPONDENTS.

Case No. 776 of 1895.

Pre-emption—Mortgage by conditional sale—Failure by pre-emptors to tender amount due on mortgage after notice, effect of—Plaintiff in pre-emption suit acting banami—Joint suit for pre-emption by numerous occupancy tenants—Price to be paid by pre-emptors on foreclosure of mortgage—Punjab Laws Act, 1872, Sections 13, 14, 15.

Held, that in the case of a foreclosure of mortgage by conditional sale, the failure on the part of the pre-emptor to tender the amount due on the mortgage after notice duly served upon him, does not involve forfeiture of his right of pre-emption, the provision as to forfeiture contained in Section 14 of the Punjab Laws Act, which deals with sales, having been intentionally omitted in Section 15 of the Act, which deals with foreclosures.

Held, further, that, though when it is proved that a plaintiff in a pre-emption suit is acting *banami* the Court should refuse the nominal plaintiff a decree, a plaintiff in such a suit is not disentitled to a decree merely because, in order to raise funds for the maintenance of his suit, he has entered into an agreement with other persons as to what he will do with the land if he gets it, any subsequent transfer of such land by the plaintiff after he has obtained it giving rise to a fresh cause of action to the other pre-emptors.

In a joint suit for pre-emption by several occupancy tenants and others it was objected on appeal that (1) the occupancy tenants had joined strangers in the plaint, (2) that plaintiffs were not the whole body of the occupancy tenants, and (3) that as individual tenants they could not combine their claims in a single suit.

Held, that the said objections were unfounded. If the list of plaintiffs included any persons who were not occupancy tenants, the proper course was to take the objection at the first hearing and have their names struck out, which could be done without altering the plaint generally or affecting the right of the remaining plaintiffs to claim the whole property. Moreover, as it was not disputed that each occupancy tenant could sue separately for the whole property, or that the whole property would be divided equally among those tenants who succeeded in obtaining a decree, there was no reason why the plaintiffs could not sue jointly, even upon the assumption that they did not represent the whole body of the tenants.

As regards the price to be paid by the pre-emptor, *held*, that he was entitled to take the property on foreclosure on payment, not of what was due on the mortgage, but of the market value only.

The mere fact that a pre-emptor in his eagerness to get the land and to outbid others, had professed himself ready to pay a sum considerably more than the market value, held, not to amount to an estoppel, it being established that such statement did not lead defendant to confess judgment or to do any other act which he would not have done had the statement not been made.

*First appeal from the order of Kazi Muhammad Aslam, C.M.G.,
District Judge, Hissar, dated 11th June 1895.*

Grey and K. P. Roy, for appellant.

Oertel, for respondents.

The facts of the case are fully stated in the judgment of the Court delivered by

ROZ, C. J.—We have before us on appeal or revision five 15th Feb'y. 1898. cases relating to claims to pre-emption in the village of Darbi in the Sirsa *tahsil* of the Hissar District.

That village appears to be held by a body of proprietors, descendants of a common ancestor, on shares, represented by *biswas*, the total being 20 *biswas*, or 1 *bigha*.

In 1889 Jamal, one of the proprietors, sold for Rs. 6,675 out of his shares $3\frac{3}{4}$ *biswas* to Ramsukh Das, but in 1890, no doubt to escape threatened suits for pre-emption, Ramsukh Das sold these $3\frac{3}{4}$ *biswas* to Nihal and other proprietors for Rs. 7,450. On the same date these men executed in his favour a mortgage by conditional sale, to be redeemed in two years, of these $3\frac{3}{4}$ *biswas* and of $1\frac{1}{2}$ *biswas* of their own share, or 5 *biswas* in all for Rs. 8,100, the consideration being the Rs. 7,450 unpaid purchase money, and Rs. 650 said to have been paid in cash.

At the same time Jamal mortgaged 2 *biswas* more to Ramsukh Das on the same terms.

He also in January 1891 mortgaged another 10 *biswas* to Ramsukh Das on the same terms for Rs. 300.

In the mortgages for 5 *biswas* and 2 *biswas* Ramsukh Das issued notices of foreclosure on the mortgagees in December 1892 (applied for on 28th November 1892) and on 4th September 1893 (applied for on 29th August) notices were issued to the pre-emptors under Section 13 of the Punjab Laws Act. On 19th February 1894 two deeds of sale, one for the 5 *biswas* for Rs. 15,000, the amount then due under the terms of the mortgage, and one for the 2 *biswas* for Rs. 5,315, similarly due, were executed by the mortgagors in favour of the mortgagee.

On 7th January 1895 Fazal-ud-din and other occupancy tenants instituted two suits for pre-emption of the 5 and 2

biswas, respectively, sold by the two deeds of 19th February 1894, and on 15th February 1895 two similar suits were instituted by Nazra, one of the proprietors, and a near agnate of the mortgagor-vendors.

The District Judge dismissed both Nazra's suits on the ground that they were collusive, or not brought for his own benefit, and he decreed both the tenants' suits on payment of what he considered to be the market value, *viz.*, Rs. 8,900 for the 5 *biswas* and Rs. 3,560 for the 2 *biswas*.

As regards the 2 *biswas* both Nazra and Ramsukh Das appealed to the Divisional Judge, who decreed Nazra's appeal, and gave him pre-emption on payment of Rs. 3,560, thus dismissing Ramsukh Das' appeal and the tenants' suit.

As regards the 5 *biswas*, first appeals have been filed in this Court by Ramsukh Das and Nazra, and as regards the 2 *biswas* there are further appeals by Ramsukh Das and the tenants.

Jamal's mortgage for 10 *biswansis* was foreclosed by Ramsukh Das through the Courts, and on the final decree of the Court, Bala, a proprietor, sued for pre-emption. His suit was decreed by the District Judge on payment of Rs. 692, the amount due under the mortgage, and this decree was upheld by the Divisional Judge. Ramsukh Das has applied to this Court for revision or a further appeal under Section 40 of the Punjab Courts Act, and his petition has been admitted for hearing with the other similar appeals.

The ground of Ramsukh Das' appeal in both cases, regarding the 5 *biswas* and 2 *biswas* against both Nazra and the tenants, is that the transaction of 19th February 1894 was not an independent and fresh sale, but merely the conclusion by mutual agreement, instead of by a formal suit, of the foreclosure proceedings, and that, as in the course of these proceedings, notices had been duly issued to the pre-emptors, and as they failed to tender the amount due on the mortgage, their right to pre-emption was lost. As regards Nazra, there was the further objection that his suits were not *bonâ fide*, but for the benefit of a third party to whom he had alienated the property claimed in anticipation of a decree, and as regards the tenants there is the further objection (1) that they have joined strangers in the plaint, (2) that the plaintiffs are not the whole body of occupancy tenants, and (3) as individual tenants they cannot combine their claims in a single suit. Finally there is the objection that, if either the tenants or

Nazra are found entitled to a decree, the price stated in the deeds of 19th February 1894 was fixed in good faith, and is, moreover, not in excess of the true market value of the land and this has been admitted by Nazra himself.

As to the first point, we agree with the lower Courts that the transaction of 19th February 1894 was, in fact, as stated by the deeds themselves, a fresh sale. It may be true that, assuming the foreclosure proceedings to have been regular, the mortgagors had lost their title to redeem on 10th December 1893, but something still remained to be done in order to transfer a complete proprietary title to the mortgagee, and the parties elected to do this not by a suit in Court, or by a mere acknowledgment by the mortgagors that their rights were extinguished, but by regular deeds of sale.

But even if we were to regard the deeds of 19th February 1894 as merely finally closing the foreclosure proceedings, we should not be prepared to hold either that the suits were barred by limitation, or that the pre-emptors by not tendering the amount due on receipt of notice had lost their right to pre-emption. As to limitation, as the property sold was a share in joint undivided property, and so incapable, according to many rulings of this Court, of physical possession, limitation would be one year from 19th February 1894.

As to forfeiture of right by non-tender, the first Court has given some strong reasons for holding that the notices were not in fact served, that they were neither served on the pre-emptors individually nor posted on the village gate, or publicly proclaimed. We need not, however, discuss the evidence on this point, for we agree with the contention of the learned counsel for Nazra that, even if the notices were in fact duly served, a failure to tender the amount due on a mortgage would not involve forfeiture of a right of pre-emption. As he points out, there is a great difference both in the circumstances of the case and in the wording of the law as regards notices to pre-emptors in cases of sale and in cases of foreclosure. In the case of a sale the pre-emptor may tender either the price demanded or, if he believes that this was not fixed in good faith, the market value, and by doing so he would acquire an absolute right to take the property offered for sale. Section 14 of the Punjab Laws Act therefore very naturally provides that if he fails to make the tender, he forfeits his right of pre-emption. But in the case of a foreclosure, the pre-emptor has no power to tender the market value, he must

tender the amount due under the mortgage, although his right of pre-emption allows him to demand the property at its market value, even though this may be considerably less than the amount due on the mortgage. Also the tender of even the amount due on the mortgage would give the pre-emptor no absolute right to the property, the mortgagor might himself redeem within the year of grace, for the law (Section 13) distinctly contemplates the issue of notice to pre-emptors at the same time as those to the mortgagors. Even if the mortgagors did not redeem, much would remain to be done by the pre-emptors before they could obtain actual possession. We thus find that the provision as to forfeiture contained in Section 14 (sales) is omitted in Section 15 (foreclosure cases) and we have no doubt that the omission is intentional.

Nazra's right to pre-emption, if his suit is not barred for the reasons just considered, is admittedly superior to that of the tenants, but it is challenged by them, as well as by defendant, Ramsukh Das, on the ground that it is not *bonâ fide*. The ground for this allegation is that in order to raise the money he was called on by the District Judge to pay into Court, he joined, with others not parties to the suit, some of whom are said not to have any right of pre-emption in mortgaging not only their own land, but the land they expect to get in the present case, to a share in which these strangers were to be admitted. Now there may be authority for holding that when it is proved that a plaintiff in a pre-emption suit is acting *banami*, that is, that another person will, on the plea that he is the real purchaser, be entitled to take from plaintiff whatever may be decreed him, the Court should refuse the nominal plaintiff a decree. But there is no authority for holding that a plaintiff may not enter into any agreement with others as to what he will do with the land if he gets it, and thus raise funds for the maintenance of his suit. In such a case the plaintiff is entitled to his decree, and if after obtaining it he proceeds to transfer the land; a fresh cause of action will arise to other pre-emptors. It would obviously be most inconvenient and improper to try suits for pre-emption, not on the true issues of the case itself, but on side issues raised by pleas of the defendant as to agreements alleged to have been entered into by the plaintiff as to the future disposal of the property.

We thus hold Nazra entitled to a decree for not only the 2 *biswas* but also for the 5 *biswas*. But it is still necessary to

consider the claims of the tenants, for we think that, if it is found that they would be entitled to a decree but for the decree in favour of Nazra, the proper course is not to dismiss their suit entirely, but to give them a conditional decree to take effect only if Nazra fails to execute his decree.

We think that the special objections to the tenants' suit are unfounded. If the list of plaintiff included any persons who were not occupancy tenants, the proper course was to take the objection at the first hearing and have their names struck out. This could be done without altering the plaint generally, or affecting the right of the remaining plaintiff to claim the whole property. Nor, assuming that the plaintiffs do not represent the whole body of the tenants, do we see why they cannot sue jointly. It is not disputed that each occupancy tenant could bring a separate suit for the whole property, or that the whole property would be divided equally amongst those tenants who succeeded in obtaining a decree. To insist that some fifty separate suits should be brought and stamp paid on them, in order to obtain a result, which can be obtained equally well in a single suit, would be opposed to the most ordinary common sense, and could only result in hopeless chaos and the ultimate defeat of the rights of all the pre-emptors. We are, therefore, of opinion that the tenants should also get a decree to be executed only in case Nazra fails to execute his decree.

As regards the price to be paid, there can be no question of good faith. It is perfectly clear that from first to last the action of Ramsukh Das has been an elaborate device to defeat the law of pre-emption, and the terms of the mortgages by conditional sale were arranged, not with a view to the mortgage being redeemed by the mortgagors, but in order to create such a charge on the property that it would be impossible to redeem. We may add, as already pointed out, that, even had the mortgage been entered into in the most perfect good faith, the pre-emptors would have been entitled to take the property on foreclosure on payment, not of what was due under the terms of the mortgage, but of the market value only.

As to what is the true market value, we see no reason for differing from the concurrent findings of the lower Courts. This more than covers the money actually paid by Ramsukh Das, and is more than thirty times the *jama*. As has often been pointed out an average deduced from other sale deeds is of little value, because not only may the quality of the land

be different, but we can never know what part of the price entered in the deeds was really paid. The fact that a canal has come or will soon come to the village may raise the value of the land now, but it could not have raised it much at the time the suits were brought.

It is urged that Nazra had no difficulty in raising Rs. 22,000, but this money was raised, not only on the security of the land in suit, but on other land also.

It is further urged that at any rate Nazra should be made to pay Rs. 15,000 for the 5 *biswas* as he admitted that this was the real value of the land. But Nazra was certainly entitled to take the land at its market value, and in his plaint he distinctly claimed to do so. The fact that in his eagerness to get the land and to outbid the tenants he professed himself ready to pay Rs. 15,000, cannot act as an estoppel, for his statement did not lead defendant to confess judgment, or to do any other act which he would not have done if the statement had not been made.

Our decrees in the appeals before us will therefore be—

(1) as regards the 5 *biswas*—

(a) that the order of the District Judge dismissing Nazra's suit be reversed, and that Nazra be given a decree conditional on his paying into Court, and within three months from this date, if he has not already done so, or if he has withdrawn the money paid in, the sum of Rs. 8,900, less his costs in both Courts, which will be paid by Ramsukh Das, defendant. The tenants will bear their own costs in Nazra's appeal to this Court and in the first Court if they were made parties to his suit. If Nazra fails to pay as above ordered, his suit will stand dismissed with costs throughout;

(b) the appeal of Ramsukh Das against the decree in favour of the tenants be dismissed with costs, as far as he is concerned, but that, as far as Nazra is concerned, the decree of the District Judge in favour of the tenants be so far modified that it be directed that the said decree take effect only in case Nazra fails to execute the decree given him under the preceding order. Should Nazra execute that decree, the plaintiffs' (tenants) suit will stand dis-

missed in the first Court, the parties bearing their own costs in that suit:

(2) as regards the 2 *biswas*—

(1) the appeal of Ramsukh Das is dismissed with costs;

(2) the appeal of the tenants is so far accepted as it is ordered that, if Nazra fails to execute the decree given in his favour by the Divisional Judge, the decree in favour of plaintiff-tenants given by the District Judge be restored with all subsequent costs against Nazra.

As regards the petition for revision in the case of 10 *biswansis*, it is sufficient to say that it is clear on the above findings that Ramsukh Das is not, and never was, a real member of the proprietary body, and even if he had been, there can be little doubt that the plaintiff's right would have been superior to his. His petition for revision is dismissed with costs.

No. 20.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Stogdon.

MRS. E. M. BATES,—(DEFENDANT),—PETITIONER,

Versus

MR. F. PRESTAGE,—(DECEASED),—PLAINTIFF),—
RESPONDENT.

} REVISION SIDE

Case No. 2125 of 1897.

Death of sole plaintiff after conclusion of case but before delivery of judgment—Decree drawn up in favour of deceased, plaintiff—Material irregularity—Civil Procedure Code, 1882, Sections 365, 366.

In a certain case after evidence had been taken and arguments heard on the 28th and 29th September 1897, the District Judge on the 2nd November 1897 gave the (sole) plaintiff a decree for the property claimed, and at the foot of his judgment recorded the following note:—
“It having been brought to my knowledge that plaintiff has died
“in the interim, I deliver judgment notwithstanding, being guided by
“*I. L. R.*, XXI, Bom., 314, and the authorities quoted therein, defendant's
“counsel agreeing.” Defendant applied to the Chief Court on the Revision Side to set aside the said decree.

Held, that under the circumstances of the present case, there had been a disregard of the provisions of the Civil Procedure which had materially prejudiced the defendant, inasmuch as she could not appeal against a dead person, and had no right of appeal against his heirs who were not on the record, and was moreover deprived of the possibility of the

suit being allowed to abate in consequence of no application under Section 365, Civil Procedure Code, being made within the time allowed by law.

Held, therefore, that the decree of the District Court must be set aside and the case remanded for disposal in accordance with law with reference to Sections 365 and 366 of the Code.

ROX, C. J.—A decree passed in favour of, or against, a dead person is not *ipso facto* a nullity, and all that can be said in such a case is that there has been a disregard of the provisions of the Civil Procedure Code. Each case must be decided on its merits, and the decree should be set aside or maintained, as if the death occurred after decree, according as the disregard of procedure has or has not materially prejudiced the parties.

I. L. R., XXI Bom., 314; *I. L. R.*, VI Mad., 180; *I. L. R.*, XV Mad., 399; *I. L. R.*, XVII All., 478; No. 31, *Punjab Record*, 1886; No. 7, *Punjab Record*, 1889; and No. 78, *Punjab Record*, 1891, referred to.

Petition for revision of the order of Captain C. P. Egerton, District Judge, Simla, dated 2nd November 1897.

H. A. B. Rattigan, for petitioner.

The following judgments were delivered by the learned Judges:—

15th Feby. 1898.

STODGON, J.—Mr. Prestage obtained a decree against Mr. Wallace for possession of a bungalow and $12\frac{1}{4}$ acres of land in Kotgarh. In execution he was resisted by Mrs. Bates claiming to be in possession on her own account. Her claim was, therefore, under Section 331, Civil Procedure Code, numbered and registered as a suit between Mr. Prestage, the decree-holder, as plaintiff, and Mrs. Bates, the claimant, as defendant. Evidence was taken and arguments were heard on the 28th and 29th September 1897, on which latter date judgment was postponed. On the 2nd November 1897 the Court gave Mr. Prestage a decree for the property claimed, and at the foot of its judgment recorded the following note:—"It 'having been brought to my knowledge that plaintiff has 'died in the *interim*, I deliver judgment notwithstanding, 'being guided by *I. L. R.*, XXI Bom., 314, and the authorities 'quoted therein, defendant's counsel agreeing."

Defendant has applied to this Court to revise the decree of the District Court. She has adopted this course in preference to appealing to the Divisional Judge, because it has been held in No. 7, *Punjab Record*, 1889, that a decree passed by inadvertence against, or in favour of, a dead party is a nullity, from which no appeal lies. In No. 31, *Punjab Record*, 1886, the representative of a respondent in the lower Appellate Court who had died, and against whom a decree was passed

notwithstanding his death, was not allowed to appeal to this Court. No. 78, *Punjab Record*, 1891, is also to a similar effect.

Rama Charya and others, Appellants v. Ananta Charya and others, Respondents, I. L. R., XXI Bom., 314, is similar to the present case, in that the death occurred in the *interim* between the conclusion of the argument and the delivery of judgment, but there is this difference that in *Ram Charya's* case one of the defendants died, while in the present case it is the sole plaintiff who has died. The learned Judges of the Bombay Court in their judgment adverted to the practice of the English Courts, permitting judgment to be entered *nunc pro tunc*, where the signing of them has been delayed by the act of the Court, and noted that such practice was now confirmed by order XVII R, 3 of the High Court of Justice. They did not, however, commit themselves absolutely to the acceptance of the *nunc pro tunc* rule, but observed that as there was no question of principle involved, they ought to follow the ruling in *Narna v. Manager Parambhatta* and to consider the drawing up of the decree as at the utmost merely irregular. They further remarked that the legal representatives of the deceased defendant had not pointed out that they had been in any way prejudiced.

In my opinion the action of the District Judge in passing a decree in favour of a person whom he knew to be dead was irregular. He should have adjourned the delivery of judgment in order to enable the legal representative of the deceased plaintiff to apply under Section 365, Civil Procedure Code, to have his name entered on the record in the place of the deceased plaintiff. We are not obliged to interfere in all cases of irregularity, and *Rama Charya's* case is one in which an irregularity was half admitted, but held to be immaterial. In that case the Court of first instance passed a decree awarding a portion of the plaintiff's claim. The plaintiffs appealed to the High Court. Arguments were heard on the 23rd and 30th November 1892. Defendant No. 1 died on the 12th June 1893, and the appeal was dismissed on the 6th July 1893. The defendants had accepted the decree of the first Court and were bound by it, and as the High Court merely confirmed that decree, the legal representatives of defendant No. 1 could not possibly have been prejudiced by the omission to bring them on the record. As remarked by the learned Judge they had no merits whatever. Had they had any, it is very possible that their objection would have been entertained. I do not therefore think that there is any real conflict between

the decision of the Bombay Court and those of this Court, and *Ramasami Ayyangar v. Bagirathi Ammal*, I. L. R., VI Mad., 180; *Krishnayya v. Unnissa Begam*, I. L. R., XV Mad., 399, and *Imdad Ali v. Jagan Lul*, I. L. R., XVII All., 478 at 482. Each case must be disposed of on its own merits. In the present case the irregularity appears to be material. Defendant cannot appeal against a dead person, and she has no right of appeal against his heirs, who are not on the record. Moreover, it is very possible that, if the delivery of judgment had been adjourned, no application under Section 365, Civil Procedure Code, would have been made within the time limited by law, and the suit would have consequently abated. Such being the case, I would set aside the decree of the District Judge and remand the case to him for disposal in accordance with law with reference to Sections 365 and 366, Civil Procedure Code.

16th Feby. 1898.

ROE, C. J.—I am prepared to concur in the order proposed. I do not think, as some of the earlier decisions of this Court seem to imply, that a decree passed in favour of, or against, a dead person, is *ipso facto* a nullity: All that can be said is that there has been a disregard of the provisions of the Procedure Code and, in my opinion, the decree should be set aside or maintained, as if the death occurred after decree, according as the disregard of procedure has, or has not, materially prejudiced the parties.

Each case must be decided on its merits. Ordinarily if a death occurs before the trial, that is the taking of evidence and hearing of argument, is concluded, the omission to bring on the record the legal representatives of a deceased party must prejudice them, as it deprives them of an opportunity of being heard. If the death occurs after argument has been concluded and the case has been adjourned for the delivery of judgment only, then, as my learned colleague observes, there is a difference between the case of the death of a respondent or defendant and that of a plaintiff or appellant.

The omission to bring on the record the legal representative of a deceased respondent or defendant, could injure no one. If brought on, they could not be heard, they would only appear to hear judgment. And had the death occurred immediately after delivery of judgment, the decree could have been executed against them without further proceedings. On the other hand, when the death is that of a plaintiff or appellant, the defendant or respondent must obviously be prejudiced by the

disregard of procedure, he is deprived of his chance of the suit or appeal abating, and at the very least he must be put to the trouble and expense of finding out the legal representatives and bringing them on the record. Thus in the present case the learned counsel for the defendant says that, as far as he can ascertain, the deceased plaintiff has left no legal representative in India, and his legal representative is believed to be a widow residing in England, address unknown. There was thus a very great probability of the suit being allowed to abate, and it is certain that very great trouble and expense would be caused to defendant, if she had to take the necessary steps for discovering the legal representatives of the deceased plaintiff and bring them on the record for purposes of appeal. I do not think the note by the Court of the consent of defendant's counsel to delivery of judgment, which was probably given without a full knowledge of the difficulty of finding the legal representative of the deceased plaintiff, deprives the defendant of her right to apply to this Court for the relief to which, but for that consent, she would otherwise be entitled.

I would only remark in conclusion that I understand the Bombay ruling referred to in these proceedings as in no way implying that the *nunc pro tunc* principle of the English Courts applies to the Indian Courts, to the extent of allowing them to disregard the provisions of the Procedure Code, or of giving to their decrees a date other than what the Code distinctly says they must bear. The English practice is, I think, referred to only to show that there would be no violation of fundamental principles in treating a death, occurring in the interval between the closing of the hearing and the delivery of judgment, as if it had occurred after judgment. Having thus decided that the decree is not *ipso facto* a nullity, the Court proceeded to consider the merits of the particular case, and this is the course I have followed in this case.

Application allowed.

Full Bench.**No. 21.**

Before Sir Charles Roe, Kt., Chief Judge, Mr. Justice Frizelle and Mr. Justice Reid.

REVISION SIDE. }

**NARAIN DAS AND ANOTHER,—(PLAINTIFFS),—
PETITIONERS.**

Versus

**MANOHAR LAL AND OTHERS,—DEFENDANTS,—
RESPONDENTS.**

Case No. 1052 of 1897.

Civil Procedure Code, 1882, Sections 520, 521, 522, 523, 525, 622—Power of Court to inquire into objection denying validity of a reference to arbitration—Revision—Practice.

Held, by the Full Bench, that it is not competent to a Court, upon an application, under Section 525 of the Civil Procedure Code, to file an award, to inquire into and decide objections other than those specified in Sections 520 and 521 of the Code.

It is not the invariable, though it is the usual, practice for a High Court to refuse to interfere, under Section 622 of the Code, when the party professing to be injured has another remedy open to him.

No. 134, *Punjab Record*, 1888, and No. 49, *Punjab Record*, 1893, overruled.

*Petition for revision of the order of Panjit Hari Kishen Kaul.
District Judge, Lahore, dated 20th May 1897.*

K. P. Roy, for petitioner.

Madan Gopal, Robinson and Jaishi Ram, for respondents.

The judgments of the learned Judges, who comprised the Full Bench, were as follows :—

16th March 1898.

ROE, C. J.—In this case an application was made to the District Judge of Lahore to file an award under Section 525, Civil Procedure Code, the causes shown against filing it were objections which went to the root of the award, by denying the validity of the reference. The District Judge considered these objections as not falling under Sections 520, 521, Civil Procedure Code, and he therefore declined to go into them on the merits, and he rejected the application under Section 525, Civil Procedure Code, directing the petitioners to seek to enforce their award by a regular suit.

The Court has been asked to revise the order of the District Judge, under Section 622, Civil Procedure Code, on the ground that the District Judge had jurisdiction to consider the

objections and dispose of them, and as the question, whether he had or had not this jurisdiction, is one on which the decisions of the High Courts and of this Court are conflicting, and is also one of great importance and frequent recurrence, the case has been referred to a Full Bench.

There can be no question that if the District Judge had jurisdiction to consider the objections, his order refusing to do so and dismissing the application is open to revision, under Section 622, Civil Procedure Code. It was urged, as a preliminary objection, that as the petitioners admittedly had another remedy open to them, *viz.*, a regular suit, the Court should follow the invariable practice of all the High Courts, and, as a matter of discretion, refuse to exercise its powers under Section 622.

No doubt it is the usual and proper course for a High Court to refuse to interfere, under Section 622, Civil Procedure Code, when the party professing to be injured has another remedy. But it cannot be said to be invariably the practice, and it is in fact by the exercise of their powers under Section 622, that the High Courts and this Court have delivered their judgments on the point before us. Of our power to consider the present application under Section 622 there can be no question, and, for the reasons already stated, we have considered it expedient to exercise that power.

The learned counsel for the petitioners puts the case briefly thus:—Although Section 525, Civil Procedure Code, makes no provision for the hearing of any objections other than such as are contained in Sections 520, 521, Civil Procedure Code, yet it is necessarily the duty of a Civil Court to decide all objections that are raised before it, and unless it had power to deal with all objections to applications under Section 525, Civil Procedure Code, it would be in the power of any one by putting forward an objection not falling under Sections 520, 521, Civil Procedure Code, however unfounded it may be, to render that section practically inoperative. This was the view taken by the Allahabad ruling in the Full Bench decision reported at page 21, *I. L. R., XVII All.*, and followed in *I. L. R., XX Mad.*, page 89. It is also urged that the opinion of the learned Chief Justice of the Allahabad High Court, expressed in the judgment above mentioned, that, if the general view taken in that judgment is not accepted, it may still be held that an objection that there has been no legal reference to arbitration, is one falling under Section 526, Civil Procedure Code, is correct.

As regards the opposite view taken by the Calcutta High Court Full Bench *I. L. R.*, *XVI Cal.*, page 213, and by the Bombay High Court in *I. L. R.*, *XX Bom.*, page 596, it is pointed out that the question really referred to the Full Bench of the Calcutta Court was whether objections, which did fall under Sections 520 or 521, Civil Procedure Code, could be gone into, and that this was the point decided. The further opinion that objections not falling under Sections 520, 521 could not be gone into was a mere *obiter dictum* of three Judges, on which the other two Judges forming the Full Bench expressed no opinion. In fact one of the two expressly reserved his opinion.

As regards the Bombay High Court, it is argued that the judgments show that the Judges would have followed the Calcutta ruling, had they not felt bound by previous decisions of their own Court.

The two published rulings of this Court (*Punjab Record*, Nos. 134 of 1888 and 49 of 1893) are in accordance with the view taken by the Allahabad and Madras Courts, and it is contended that the unpublished ruling of a single Judge, Mr. H. T. Rivaz, in Chambers, in C. M. No. 255 of 1894, which accepted the Calcutta and Bombay rulings as settling the law, should not be upheld.

After a full consideration of the whole subject, I think that it should be upheld. I am quite unable to accept the view taken by the High Court of Allahabad, that an objection that there has been no valid reference or no valid award can be brought under Section 520, as an objection that the arbitrators have decided what has not been referred to them, because nothing was in fact referred; and there were no arbitrators. The meaning of Section 520 appears to me perfectly plain. It assumes that there has been a valid reference and a valid award, and a perusal of the order of reference and of the award will enable the Court to ascertain at once whether the award has omitted to decide anything referred, or has decided more than was referred. If it has done either of these two things, then the error is rectified by returning the award for completion by adding a further decision on the points left undecided, or by striking out the decision on points not referred to arbitration. To construe Section 520 as authorising the Court to enquire into and decide complicated questions of law and fact, appears to me opposed both to the plain words of the section itself, and to the whole spirit of the arbitration proceedings. That spirit, I understand, to be this—

given the fact that there has been a reference to arbitration and an award, that award shall be final, unless there has been misconduct on the part of the arbitrators. Whether the award falls short of, or exceeds, the reference, can be seen at once by the Court and remedied under Section 520; whether there has or has not been misconduct on the part of the arbitrators is a simple question of fact, which the Court should be able to decide without difficulty. Accordingly the legislature provides that when the Court has decided that there has been no misconduct it shall go on to pass judgment in accordance with the award, and this judgment shall be final.

A similar train of reasoning leads me to reject the view that all objections, not coming under Sections 520 and 521, raised to an application under Section 525, Civil Procedure Code, must be inquired into and disposed of by the Court *ex necessitate rei*. In the first place we have the words of the section itself, which appear to me clearly to limit the objections that can be put forward to those falling under Sections 520, 521. If the legislature had intended that any objection of any kind might be raised, and, if raised, must be inquired into and decided, it would probably have made some provision for this inquiry and decision, but it at any rate would not have worded the section as it stands.

The general power of a Civil Court to decide all questions raised before it appears to me to be inapplicable for another reason. The object of Sections 523 to 526, Civil Procedure Code, is to bring the parties by a short cut and a cheap method to a stage of a case which is ordinarily reached only after the institution of a suit. If a suit were instituted, not to enforce an award, but to enforce an ordinary claim, and the parties agree to arbitration, they must all join in a written application to this effect, (Section 506, Civil Procedure Code). It is quite clear that if, at any stage of the suit, one party alleged and another denied that during the progress of the suit an agreement to refer had been made, the Court would have no power to inquire into the point; and if it found that there had in fact been an agreement make an order of reference. Section 526 provides that when an application under Sections 523 or 525, or an order for reference to arbitration, or for the filing of an award, is made, the same consequences shall follow as would have followed if the order had been made at any stage of a suit. It seems to me impossible to hold that a Court, dealing with applications

under Sections 523 and 525, can exercise a power of enquiry and decision, which it could not have exercised in the course of a suit. The judgment of the Allahabad High Court concludes with the remark that, if the Court gave judgment in accordance with an award, after deciding disputed questions of law or fact regarding the reference or the making of the award, an appeal would lie against its decree. With great deference to the learned Judges who took this view, I must confess that I can see no reason whatever for it. In the Full Bench ruling of this Court, *Punjab Record*, No. 74 of 1894, it was held that, when any such objections are raised regarding arbitration proceedings in the course of an ordinary suit, the judgment is none the less a judgment following an award, and is not open to appeal. And, as already noted, by Section 526 a judgment following an award filed under Section 525, or obtained by a reference under Section 523, stands on precisely the same footing. The proceedings of the Court may disclose such a material irregularity as would justify revision under Section 622, Civil Procedure Code. But assuming that there has been no material irregularity, that the Court has understood the objections raised, taken evidence, where necessary, and decided them, I fail to see how its decision, however erroneous, can be questioned by appeal. The Code provides no appeal against the decision as an interlocutory order, and, as already stated, the judgment itself following the award is final.

The argument that it is open to any party by raising an objection not falling under Sections 520 and 521, Civil Procedure Code, and however unfounded it may be, to render the provisions of Sections 523—525 inoperative, has not, I think, much force. It is admitted that if an application under Section 523 or 525 is rejected, the person making it has still his remedy by a regular suit, and the result of driving him to such a suit by frivolous or unfounded objections would be that the objector would ultimately have to pay the costs.

If such a suit were brought the final judgment, if it followed the award, would, in my opinion, still be open to an appeal, for the finality given to judgments following awards applies only to cases where the awards have been made under the special provisions of the Procedure Code. Both the person seeking to enforce, and the person objecting to, an award would thus stand on an equal footing.

But if the other view be held, that the Court to which application is made under Sections 523 or 525 has jurisdiction

to enquire into and decide objections going to the root of the reference or award, then there would be a most glaring inequality in the position of the parties. If the objections were admitted, the petitioners, under Sections 523 or 525, would still have their remedy by a regular suit, but if they were decided against the objectors, the latter would have no remedy at all.

For the above reasons I would hold that the District Judge rightly refused to deal with the objections taken before him, and I would reject the present application.

FRIZELLE, J.—I agree with the learned Chief Judge. I do not see how the Court could adjudicate on any objections except those mentioned in Section 526. There is nothing in Sections 525 or 526 that allows it to do so, and I think it was the intention of the law that it could not.

REID, J.—For the reasons given by the learned Chief Judge, I concur in holding that the lower Court did not fail to exercise jurisdiction vested in it.

The applications were finally disposed of by the following order :—

ROE, C. J.—In accordance with the above judgment the 16th March 1898. application in both the cases before us is dismissed, but as the point decided against the petitioners is one on which the High Courts are equally divided, and the published judgments of this Court are in their favour, we direct that the parties pay their own costs in this and in the lower Court.

Application dismissed.

No. 22.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Frizelle.

JOWALA SINGH,—(DEFENDANT),—APPELLANT,

Versus

KALA SINGH,—(PLAINTIFF),—RESPONDENT.

Case No. 1349 of 1895.

Occupancy rights, succession to—Adopted son—Punjab Tenancy Act, 1887, Sections 5, 59—Plea raised in Appellate Court for the first time.

Held, that a daughter's son, who has been adopted, is not entitled, by virtue of clause (3) of Section 5 of the Punjab Tenancy Act, to succeed to the occupancy rights of his adoptive father who was a tenant under the said section, and that the objection to such succession can be taken by the male collaterals of the tenant as well as by the landlord.

} APPELLATE SIDE.

The proviso in clause (3) of Section 5 of the Act refers only to the original acquisition of the right.

An Appellate Court is entitled to take notice of a question of law which clearly arises in the case, even though the question may have been overlooked both by the parties to the case and by the Courts which have dealt with it.

Further appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 23rd April 1895.

Parkash Chand, for appellant.

The judgment of the Court was delivered by

17th Decr. 1897.

ROE, C. J.—In this case the plaintiff sued for possession of the land left by Gharibu, an occupancy tenant, under Section 5, clause not given, of the Punjab Tenancy Act, on the ground that plaintiff was the daughter's son of Gharibu and had been adopted by him in early years. His suit was against all the male collaterals of Gharibu, but the defence was conducted by one of them, Jowala Singh only, who appears to be the person in actual possession. His plea was a denial that plaintiff was in fact adopted, and an allegation that even if the adoption did in fact take place it was invalid by custom.

Both the lower Courts have found both these points against defendant, and he appeals to this Court urging both his former pleas and the further objections which he also took in the Divisional Court, that plaintiff cannot succeed under Section 59 of the Tenancy Act.

We should not be prepared to come to a finding on the question of custom without a further enquiry, but it is unnecessary to consider the point until the plea put forward on the basis of the Tenancy Act is decided.

We do not think that we can refuse to consider the plea simply because it was not put forward by defendant in the first Court. It is not a plea involving any fact within the knowledge of defendant, which he could be expected to put forward without legal assistance, and when he obtained that assistance he did put it forward. It is also to be noted that when he pleaded to the suit the Full Bench ruling of this Court published as *Punjab Record*, No. 43 of 1895, had not been delivered, and in any case we are not prepared to say that an Appellate Court should not take notice of a question of law which clearly arises in the case even though the question may have been overlooked both by the parties to the case and by the Courts which have dealt with it.

This being the case we are clearly of opinion that the Full Bench Ruling referred to is fatal to plaintiff's claim. The only point left open to further consideration in that case is whether, if a formal adoption under Hindu Law is proved as a fact, the adopted son might not be regarded as a real son. Such a point cannot arise in the present case for the plaintiff, a daughter's son could not be adopted under Hindu Law.

The fact that Gharibu was a tenant under Section 5 of the Tenancy Act does not alter the case. The particular clause of that section under which he obtained his right is not stated, but even supposing him to have been a tenant under clauses (1), (2), the proviso in clause (3) that the words in the former clause denoting natural relationship include relationship by customary adoption clearly refer only to the original acquisition of the right. The provision is that a tenant, to acquire rights under Section 5 (1), (2), must at the time of the commencement of this Act for more than two generations in the male line of descent have fulfilled certain conditions, and no right of occupancy under that section can be acquired by a fulfilment of its conditions subsequently to the passing of the Act. It is impossible to hold that any right of succession to a tenant under Section 5 (1), (2) is given by clause (3) of the section. Nor can it be contended that the objection now under consideration can be entertained only when put forward by a landlord. A male lineal descendant in the male line succeeds under Section 59 in preference to the landlord, and if the latter can exclude an adopted son, *a fortiori* the former can do so.

We must, therefore, accept this appeal, and reversing the decisions of the lower Courts, direct that plaintiff's claim be dismissed. But under the circumstances of the case we direct that the parties pay their own costs throughout.

Appeal allowed.

No. 23.

Before Mr. Justice Chatterji.

REVISION SIDE. }

KAHAN CHAND,—(DEFENDANT),—PETITIONER,

Versus

MUSSAMMAT INDAR KAUR,—(PLAINTIFF),—
RESPONDENT.

Case No. 324 of 1897.

Small Cause Court Act, 1887, Section 25—Second application for revision after rejection of first application—Civil Procedure Code, 1882, Sections 622, 623 (b).

Held, that there is nothing in the Civil Procedure Code or in the Small Cause Courts Act, 1887, to prevent the Court entertaining a fresh petition under Section 25 of the latter Act after dismissal of a previous petition under the same section.

Held, further, that even if the former order on the previous petition could be held to be a bar to the Court entertaining the subsequent petition, the latter could, and ought to, be treated as one for review of judgment, falling under clause (b) of Section 623 of the Civil Procedure Code, which is wide enough to include unappealable orders of the Court hearing the application, whatever may be the *status* of the Court.

The Court has inherent power to remedy injustice by a reconsideration of an order passed by it, unless precluded by a rule of procedure or practice.

Petition for revision of the order of Khan Bahadur Sheikh Khuda Bakhsh, Judge, Small Cause Court, Lahore, dated 23rd December 1896.

W. H. Rattigan, Q. C., and Herbert, for petitioner.

K. P. Roy and Fazl Din, for respondent.

The judgment of the learned Judge was as follows:—

28th Jany. 1898.

CHATTERJI, J.—As regards the objection that this application does not lie as a second application for revision of the decree of the Small Cause Court, I am of opinion that it does lie. The previous order was given after issuing notice, but it threw out the former application and declined to exercise the Court's revisional jurisdiction. There is nothing in the Code or in the Provincial Small Cause Courts Act to prevent my entertaining a fresh petition, and the practice of the Court, so far as I have been able to ascertain it, is in favour of this view. So far back as 1885 it was sanctioned by a Committee of three Judges in respect of applications under Section 622, Civil Procedure Code, and the same principles apply to those under Section 25 of th

Provincial Small Cause Courts Act. I have myself entertained second applications of this nature occasionally, and I am informed by Mr. Justice Stogdon that he recollects an instance of this kind before himself.

I am also disposed to think that if the former order can be held to be a bar to my coming to a different decision, the present application can and ought to be treated as one for review of judgment, falling under the purview of clause (b) of Section 623, Civil Procedure Code, which is wide enough to include unappealable orders of the Court hearing the application, whatever may be the *status* of the Court.

Further I have inherent power to remedy injustice by a reconsideration of my order, unless precluded by a rule of procedure or practice.

The preliminary objection is therefore over-ruled.

I have gone through the record again, and considered the arguments of counsel. I admitted this application in the hope that an amicable settlement might be arrived at between the parties, as the case is one between mother and son. This hope has not been fulfilled, and both parties are said to be equally to blame.

Under the circumstances I must again dispose of the application in the exercise of my powers under Section 25 of the Provincial Small Cause Courts Act. The petitioner's contention is based on certain legal errors committed by the Judge below. He first held the entry in the plaintiff's book to be a promissory note, and inadmissible for want of sufficient stamp, and returned the plaint for amendment. A substantially identical plaint was subsequently filed, and an objection to this effect by the defendant was over-ruled by the Judge. He then decreed the claim, believing the oral evidence as to the original advance of Rs. 1,300 by plaintiff to defendant, the payment of Rs. 200 by the latter, and his agreement to liquidate the balance in daily payments of annas 8. The oral evidence on the last point clearly refers to the transaction that was entered in the book, which has been held to be inadmissible in evidence. In effect therefore the Judge has either gone back from his opinion that the book entry was not receivable in evidence as a promissory note, or admitted oral evidence of a transaction which has been reduced to writing in contravention of the provisions of Section 91 of the Evidence Act. This is the substance of the argument of petitioner's counsel, and it is further contended that the defendant is

seriously prejudiced by a finding of the Judge in respect of a matter which he had no jurisdiction to decide, *viz.*, that Rs. 1,100 are due to the plaintiff, and that the plaintiff would go on filing fresh suits in this manner, and the present decision would make his defence *res judicata* in future.

The legal errors of the Judge were known to me when I passed the previous orders, and they are hinted at in the judgment. I nevertheless exercised my discretion, and declined to interfere, because I believed with the Judge that the plaintiff had a just claim, and had advanced a large sum of money, Rs. 1,300, to the defendant, and had been repaid only a small fraction. After giving every weight to the arguments of the learned counsel for the defendant I am unable to see that my discretion was wrongly or improperly exercised. The use of my powers under Section 25 should be subservient to the ends of justice and not to defeat them, and it is for this reason that their exercise is not compulsory, but subject to my discretion. Now, I fully concur with the view of the Judge on the merits of the case. The plaintiff's father and other reliable witnesses depose to the original loan, which is supported by the plaintiff's possession of the *hundi*, which her money is said to have enabled defendant to pay up. The second agreement is well established *in fact*, whatever may be the technical objections to its being admitted in evidence. I am unable thus to come to a different conclusion on the merits of the plaintiffs' claim, and I should be sorry to defeat it on a comparatively unimportant point of adjective law, unless I am compelled to do so.

I am not at all clear that the finding as to Rs. 1,100 being still due to plaintiff would be *res judicata*, or that defendant has no remedy to set aside that finding. But even if such be the case, that is not, in my opinion, a good ground for helping him by the use of my revisional jurisdiction to avoid the payment of what I believe with the Judge to be a just debt, and for relegating the plaintiff to further litigation.

I therefore adhere to my former order and reject the application. As there was something to be said for the defendant on the strictly legal aspects of the case, I direct the parties to pay their own costs of the present proceeding.

Application rejected.

No. 24.

Before Mr. Justice Chatterji and Mr. Justice Clark.

SHAD ALI KHAN,—(PLAINTIFF),—APPELLANT,

Versus

ABDUL GHAFUR KHAN AND OTHERS,—

(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 269 of 1896.

Custom—Alienation—Distinction between gifts inter vivos and wills—
Onus probandi—Pathans of Peshawar District.

Although a proprietor has, by custom, a plenary power of alienation *inter vivos*, it does not follow that he has, by custom, a power of alienation by will, and the *onus* of proving that he has the latter power rests upon the party taking his stand on the will, especially when an alienation by will is void under the personal law of the proprietor.

The distinction between gifts *inter vivos* and wills discussed by Chatterji, J.

First appeal from the order of W. B. DeCourcy, Esquire, District Judge, Peshawar, dated 2nd December 1895.

Lal Chaud, for appellant.

Madan Gopal and Umar Baklish, for respondents.

The case was remanded for further inquiry upon the point of custom by the following order of the Court :—

CHATTERJI, J.—Muhammad Ibrahim Khan, Khan of Zaida, 15th Feby. 1898. died in 1886, leaving three sons, Abdul Ghafur Khan and Najaf Khan, defendants, by one wife, and the plaintiff, Shad Ali Khan, by another. The plaintiff's mother died while he was a babe in arms, and he was brought up by his mother's relations. The plaintiff has lately attained majority, and sues for a half share of the property left by his father under the rule of *chundawand*.

The defendants plead that (1) the deceased made a will, which was left in the custody of the Reverend Mr. Hughes, by which plaintiff was left 139 *kanals* 8 *marlas* 7 *sarsais* of land and a Persian-wheel and two houses, and cannot claim anything more; (2) defendant No. 1, as Khan, is entitled to all the property, a list of which is attached to the written statement pertaining to the Khanship; (3) defendant No. 1, by tribal custom, is entitled to a double share of the paternal property as the eldest son; (4) the plaintiff as the son of a Hindki woman is entitled only to a half share of what a son by an Afghan wife, like defendant No. 2 would get, which would amount to 105 *kanals* 5 *marlas* and two houses, but has got more under the will,

(5) the plaintiff has no claim to the *muafi*, and (6) the 200 *kanals* at Garh Munara are the self-acquired property of defendant No. 1. The will set up by defendants consists of two parts, *viz.*, the original will, which is dated 17th April 1874, and a codicil executed on 12th January 1880.

The plaintiff denies that he is the son of a Hindki woman and traverses the other allegation. He also restricts his claim to property left by the father and does not ask for a share in the *muafi* grant by Government.

Only two issues have been drawn and inquired into, *viz.*, “(1) whether the will propounded was executed or not by “Muhammad Ibrahim Khan? If so, (2) whether he was or “was not competent with reference to custom to execute it.” Pleaders for the parties appear to have told the District Judge that inquiry on these points should be made in the first instance.

The District Judge has found against the plaintiff on both issues, and dismissed his claim, except for the land bequeathed to him by the will. This land is difficult to find out, and two commissions for this purpose were unsuccessful. The District Judge has finally left the matter to be ascertained in execution of decree.

The plaintiff appeals challenging the finding of the lower Court on both issues.

As regards the execution of the will, we see no reason after going through the evidence, for differing from the opinion of the District Judge. The witnesses produced by defendants on this point are men of respectability, and three of them appear to be Christians, whose testimony, in a dispute of this character, may be fairly assumed to be impartial. The original will is signed by the deceased, but the body of it written by someone else, but the entire codicil is in the deceased's handwriting. We have seen the documents in original, and can find no grounds for suspecting their genuineness. Muhammad Shuaib and Unwan-ud-din depose to recognizing the handwriting of Muhammad Ibrahim Khan in the codicil, and his signature under the will. Yusaf Ali, an attesting witness to the former, deposes to its having been written in his presence. The codicil is also attested by the Reverend Mr. W. Jukes, and Yusaf Ali further speaks to his having signed before him. Imam Shah and Aziz-ud-din recognize the signature of Mr. Jukes, and also an endorsement by the Reverend Mr. Thwaites in English, to the effect that the

will had been left at the Mission, and was given to the agent of defendant No. 1 by his instructions. The will and codicil are written on two sides of a stamp paper of the value of Re. 1, and they remained in the custody of the Peshawar missionaries since the execution of the first by the deceased until 15th June 1894. They were produced in the mutation proceedings on his death, and are referred to in them. There is absolutely no reason to doubt that both the documents were duly executed by Muhammad Ibrahim Khan, and we accordingly concur with the District Judge, and decide the first ground of appeal against the appellant.

The second issue is, as the District Judge rightly says, the most important issue in the present inquiry. We also concur with him that the will is not bad on the ground of undue influence. No such plea was specifically raised, as it should have been, and the plaintiff is by the very nature of his statement as regards the will, *viz.*, that he was ignorant of its execution, precluded from putting forward such a contention. There is no evidence, and there are no circumstances, giving the least support to anything that the mind of the testator was improperly influenced to make the present disposition of his property.

It remains to be seen whether the will is valid by custom. It is admitted that the will is bad under Muhammadan Law. The District Judge did not lay down on whom the burden of proof lay as regards the second issue, though he stated in his order of 13th June 1895 that it would be fixed at the next hearing when the parties filed their documentary evidence. But the defendants were made to produce their evidence first, though the District Judge in his judgment considered it unnecessary to decide on whom the *onus* lay, as he was satisfied that the owner had, according to the settlement record, plenary power of alienation, generally speaking, and that such power had been exercised by will over and over again.

We are of opinion, however, that the question of *onus* cannot be altogether ignored, and that it rests on the party taking his stand on the will. The District Judge is wrong in saying that customary law makes no distinction between the power of making alienations *inter vivos*, and of making those which are to take effect after death. The distinction has been repeatedly pointed out in several recent decisions of this Court. There is no good ground for the District Judge's opinion that the remark in No. 90, *Punjab Record*, 1891, relating to the

distinction between wills and gifts in Customary law is extra judicial. It is a deduction made from certain authorities previously quoted in the judgment, and is part of the reasoning on which the final decision in the case is founded. In No. 88, *Punjab Record*, 1895, the difference between the power of gift *inter vivos* and that by will is explained. See also No. 83, *Punjab Record*, 1895. The whole subject is fully discussed, and the principles of distinction ably summarised in Roe and Rattigan's Tribal Law, pages 25, 81 and 124, 125. In page 81 the learned authors, speaking of wills among agricultural communities, say: "Not one man in a hundred, or even in a thousand, is capable of drawing up, or even of dictating a proper will, and to admit oral wills would be an absurdity. Nor can it be said that the power of disposing of property by will should be regarded as the same as that of gifts *inter vivos*. By a gift a man injures himself as well as his heirs, by a will he injures his heirs only. Tribal custom universally insists on a gift being accompanied by possession, just as it insists on the public notification of an heir by adoption." Another ground for making the distinction between the two kinds of alienation in such communities is this. When a man gifts property in his lifetime, he is able to perfect it by possession, which is an important element in the acquisition of title, particularly in an archaic state of society. But when the donor is dead, and is unable personally to give effect to his act, how is the donee to obtain possession of the thing gifted?

His title does not accrue until after the donor's death, by which all the latter's rights in his property pass to his heirs. The donee thus can get nothing unless there is some special agency to give effect to the donor's last wishes. Again a gift without possession avails nothing against the donor or his heirs, but this rule must be abrogated before a gift to take effect after death can be enforced. These are essential differences in the nature of the two kinds of gift, and it is wrong to assume that in Customary Law the concession of the power of making gifts *inter vivos* necessarily implies concession of the power of making gifts by will.

Among Afghans of the Peshawar District, land is obviously held on tribal principles, but owing to a variety of causes the power of alienation *inter vivos* is more plenary than among agricultural tribes in other parts of the Punjab, particularly its central and eastern districts. The *Riwaj-i-am* lays it

down, and the report of the Regular Settlement, paragraph 604, admits that the entry accords with actual practice. This was also further recognized in No. 23, *Punjab Record*, 1893, though the *dictum* is not absolutely binding, as the case was one from Hazara District. The *Riwaj-i-am*, however, makes a writing and possession essential conditions of validity, and this necessarily excludes wills which are not mentioned. There are also at least two published cases in which wills have been upheld among Pathans of the Peshawar District, *viz.*, 94, *Punjab Record*, 1884, and 44, *Punjab Record*, 1897. But they related to Khalils of the Peshawar *tahsil*, and the wills were of a different character. They were gifts by childless proprietors in favour of persons related through females in the presence of somewhat distant agnates. They were upheld, as the custom was found established by instances, and in the first case the Court expressly guarded itself against its being treated as an authority on the question of the power of a testator in the presence of sons. In the second case some instances of wills were quoted partly analogous to the present one, and the defendant is entitled to the benefit of both precedents so far as they bear on the probability of Muhammad Ibrahim Khan, a Yusufzai Pathan, in the *ilaka* of Uthman, where the parties reside, having the power of testation he has exercised. But taking the entry in the *Riwaj-i-am* and the general principles above adverted to, which should govern such an inquiry, we think the *onus* lies on the defendants, who take their stand on the will, to prove that it is valid.

We do not wish, however, to lay any undue stress on this point, but merely to define the lines on which the inquiry should proceed. The main object is to enable the parties to understand their position, so that they may be able to produce all their evidence, and a decision proceeding simply upon such a point is justifiable only when it is not possible to pronounce a positive opinion on the evidence.

Now, proceeding on these principles, we have great difficulty in deciding the case on the present record, unless we adopt the unsatisfactory expedient of disposing of it on the question of *onus*. We say unsatisfactory as the point involved in this issue is one of great importance, and the case itself is of large value. The oral evidence is of little weight in a matter of this kind, and as the witnesses belong to the Peshawar District and are Pathans, a large element of party spirit underlies the evidence they give, for which allowance

has to be made. The precedents quoted need not be noticed in detail at present, as we mean to order further inquiry. Every instance that rests on purely oral testimony ought to be carefully sifted, and wherever possible the Court ought to come to a finding, (1) whether it has any bearing on the question involved in the second issue, and (2) how far it is proved. Before us counsel on both sides referred to a large number of instances culled from the oral evidence, but they have not been discussed by the District Judge, and we are therefore left without his assistance in coming to a decision as to their value. The instances resting on documentary evidence, *viz.*, records of Civil and Revenue cases, are too few to enable us to pronounce a decided opinion affirming or negating the father's right, by custom, among this class of Pathans in that part of Peshawar, to make a distribution of property by will at his pleasure among his sons. We refrain from considering them in detail at present, but we may point out that, so far as the records before us show, the District Judge appears to be incorrect in saying that the mutation of Ajab Khan's property was made according to his will. The Assistant Commissioner, no doubt, on 22nd January 1885, gave such an order, but it was set aside by the Deputy Commissioner on 20th March 1885, and mutation was directed to be made jointly in the names of all the sons in equal shares till their dispute was settled by the Civil Court. On 28th April 1885 the Commissioner upheld this order.

Some of the witnesses attempt to make a distinction between the custom of Khans and of ordinary Pathans. This should be borne in mind in making the inquiry.

Defendants' counsel asserted before us that most of the property claimed appertains to the Khanship, that defendant No. 1 is exclusively entitled to the same, and that the will, so far from injuring the plaintiff, gives him more than he would be otherwise entitled to. It is important to decide this question also at this stage, and in fact all the other issues raised by the pleadings now that the case has to go back, so that it may be ready for final decision when the return comes.

We remand the case to the lower Court to make a full and exhaustive inquiry as regards the second issue. The parties should be allowed every opportunity to produce all the evidence they consider necessary, and we suggest to the Court to send for of its own motion and examine persons of respectability and known probity and impartiality, whose

opinions on the point of custom would be relevant under Sections 48 and 49 of the Evidence Act, and valuable as guides for decision. The other issues arising in the case should also be framed, inquired into and found upon.

The return of the lower Court will be submitted with all reasonable despatch.

No. 25.

Before Mr. Justice Chatterji and Mr. Justice Clark.

NIZAM DIN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

JAGAT SINGH, MINOR, THROUGH KESAR SINGH AND
ANOTHER,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Case No. 716 of 1895.

Custom—Adoption of daughter's son—Ghumman Jats of Sialkot District—Perversion of next collaterals to Muhammadanism.

According to the *Riwaj-i-am* of the Sialkot District, it is competent to a Ghumman Jat to adopt his daughter's son, but a nephew has a prior right to be adopted. Where, however, the nephews had perverted to Muhammadanism, *held*, that it lay upon them to prove that they were entitled to be adopted in preference to a daughter's son and that their existence rendered the adoption of such daughter's son invalid, and that they had failed to prove this.

Found, under the circumstances of the case, that the *factum* of adoption had been sufficiently proved.

Further appeal from the order of A. Christie, Esquire, Divisional Judge, Sialkot Division, dated 11th April 1895.

Ganpat Rai, for appellants.

Morton, for respondents.

The judgment of the Court was delivered by

CLARK, J.—

17th Feby. 1898.

MEHTAB SINGH.

Musst. Chandan—Gulab Singh.
defendant No. 1.

Daughter.

Jagat Singh,
defendant No. 2.

Rukn Din.

Fatteh Din, &c.,
plaintiffs.

On 5th September 1887 Gulab Singh executed and registered a deed of adoption in favour of Jagat Singh. Plaintiffs sue to have the deed cancelled.

The first question is the factum of adoption. Gulab Singh never cancelled the deed of 5th September 1887, though he did not die until 1894; he gave mutation of names to Jagat Singh; Jagat Singh, both before and after, lived in his house, he was his daughter's son, and his next collaterals had turned Muhammadans.

The adoption is sufficiently proved by the deed and the treatment.

The next question is the validity of the adoption.

The parties are Ghumman Jats of the Sialkot District.

By the *Riwaj-i-am* a Ghumman Jat can adopt his daughter's son, but a nephew has a prior right. Nor is the right of adoption denied in the plaint, what is alleged there is that a daughter's son could not be adopted in the presence of plaintiffs, the question then is whether plaintiffs, having become Muhammadans, could still claim to be adopted by Gulab Singh, and exclude Jagat Singh from adoption. No precedents are quoted on the point, nor is it likely that precedents would be forthcoming.

The question of loss of right to succession on account of change of religion (Act XXI of 1850), does not arise, the question is of the right to be adopted.

To expect a Jat Sikh to adopt a Muhammadan pervert is out of the question: one of the main objects in adoption is, under the Customary Law of the Punjab, for a sonless man to procure some one to attend and care for him, or, as Sir C. Roe says, page 93 of his book on Tribal Law, it is founded on the practical benefit of companionship and assistance. There could be no community of living and very little companionship and assistance between the adopter and adopted in such a case.

It is hardly conceivable that custom should require Gulab Singh to adopt plaintiffs, if he wanted to make an adoption. A custom represents the general wish and practice of a community: a body of Sikhs would not be likely to admit the rights of adoption of a pervert, who had offended the whole community by his perversion, in preference to a daughter's son.

It was the "brotherhood" which originally expounded and enforced custom, and it cannot be supposed that they would admit a pervert's claim to adoption.

We think under the circumstances that it lay upon plaintiffs to prove that they were entitled to be adopted in preference to a daughter's son, and that their existence rendered the

adoption of a daughter's son invalid, and we think that they have failed to prove this.

We dismiss the appeal with costs.

Appeal dismissed.

No. 26.

Before Mr. Justice Frizelle.

LALA HAR BHAI,—(PLAINTIFF),—APPELLANTS,

Versus

BHANA,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Case No. 976 of 1897.

Custody of minor—Marriage of minor without consent of paternal relations—Respective rights of minor's husband and paternal uncle.

A minor girl, aged about 8 years, whose father was dead and whose mother could not be found, was given in marriage to respondent by her maternal grandmother without the consent of appellant, the minor's paternal uncle. The latter applied for the guardianship of the minor, but the District Judge dismissed his application on the ground that, if the marriage was unlawful by reason of the grandmother's incompetency to celebrate it, applicant was "at liberty to seek his remedy in a Civil Court."

Held, that the right of giving the minor in marriage lay with the appellant, and that even if a marriage had taken place between respondent and the minor, the respondent did not thereby acquire the right of guardianship when the paternal relations did not consent to the marriage.

Miscellaneous appeal from the order of Diwan Lakhmi Das, Additional District Judge, Sialkot, dated 22nd July 1887.

Parkash Chand, for appellant.

The judgment of the learned Judge was as follows :—

FRIZELLE, J.—The case has not been well inquired into by the lower Court, but it is perfectly clear that its order is wrong. Mussammatt Hukmi now before the Court is a child of about 8 years of age. Appellant is her father's brother. Her mother's whereabouts, it is admitted, are not known. Without appellant's consent or that of any of the other paternal relations, the maternal grandmother has married her to respondent, a man who looks about 30 years of age. By law appellant has a superior right of guardianship to the maternal grandmother, the mother having abandoned the girl. The right of giving the girl in marriage lay with appellant, and the other paternal relations, and even if a marriage has taken place between respondent and the minor, this does not give respondent the right of guardianship, when the paternal relations did

17th Feby. 1898.

not consent to the marriage. The conduct of the maternal grandmother in giving such a child in marriage to a man of 30, and the conduct of the latter in taking such a child in marriage without the consent of those who had the right to dispose of her, disentitle both respondent and the maternal grandmother to any right of guardianship. I reverse the order of the lower Court and appoint appellant guardian of the minor's person. There is no necessity to pass any order as to the property. Respondent to pay costs in both Courts.

No. 27.

Before Mr. Justice Chatterji and Mr. Justice Clark.

RALLIA RAM.—(PLAINTIFF),—APPELLANT,

APPELLATE SIDE.

Versus

MUSSAMMAT VED KAUR AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Case No. 1133 of 1895.

Will, construction of—Principles of construction—Bequest to Hindu widow as malik—Presumption as to nature of bequest to Hindu female.

Although in construing a will, the Court should endeavour to gather the intention of the testator from the words actually employed by him, it is quite legitimate (subject to the express terms of the will) in construing the will of a Hindu with reference to a bequest in favour of a female to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. Ordinarily, their ideas are repugnant to giving a female a power of alienation over immoveable property, especially if it is ancestral, and it may, therefore, be properly presumed, in the absence of clear indications to the contrary, that a devise of such property to a Hindu female does not confer an estate of inheritance, but only a life estate or a widow's estate as understood by Hindu Law. Nor is it a necessary result from the use of the term *malik* in respect of a Hindu female to whom a bequest is made, that she should be considered the absolute owner of the property so bequeathed to her.

Applying the above principles of construction to the terms of the will in the present case, the Court held that, as the words used by the testator on the whole admitted of the interpretation that it was intended to give merely a life estate or a widow's estate to the female devisee, such interpretation should have preference.

Further appeal from the order of Khan Muhammad Hayat Khan, C.S.I., Additional Divisional Judge, Amritsar Division, at Jullundur, dated 25th July 1895.

Fazal Din, for appellant.

Lal Chand and Ishwar Das, for respondents.

The facts of the case and the material terms of the will are fully stated in the judgment of the Court, which was delivered by

CHATTERJI, J.—One Dasu Mal, an Arora resident of Amritsar, made a will on 4th February 1878, by which he devised a house and a shop to his son's widow Mussammat Ved Kaur, and this son's adopted son, Rallia Ram, and certain other property to his widow and infant daughter. He also made his widow the legatee of the undisposed residue of his estate, giving her full power of alienation in respect of the same. Rallia Ram, plaintiff, was a minor at the time of the will. Besides being the adopted son of Mussammat Ved Kaur, he is also her sister's son. Dasu Mal died about 1880 A. D. 20th Feby. 1898.

There was some litigation between the plaintiff and Mussammat Ved Kaur about the realization of the rents of the devised property, in which Mussammat Ved Kaur remained ultimately unsuccessful. She then sued for partition of her half share in August 1892. The issue decided by the Subordinate Judge, who tried the case, was "Was half of the right in the property in suit given to the plaintiff by the will, and can she get it divided and take possession of it." The defendant then pleaded that she was not entitled to partition but only to maintenance, and that she had received it for fourteen years after the death of the testator.

The Court held that the will was not explicit as regards the right the parties respectively had under it, but that, as the defendants had admitted in the previous suit regarding rent that the plaintiff Mussammat Ved Kaur could have rent deeds written in her favour for half the property, she was entitled to have it divided so long as the parties did not alienate it, though ordinarily a mother is not entitled to more than maintenance. He therefore gave her a decree, but recorded that the parties were incompetent to alienate their shares without each other's consent.

Having divided off her share, Mussammat Ved Kaur sold half the house and shop by deed, dated 10th November 1894, to the respondents Karam Singh and Partap Singh, for Rs. 1,500 which was made up thus:—

	Rs.	A.	P.
Due to the vendees on account of a registered bond, No. 164, dated 13th May 1893	858	13	3
Interest on the same	102	0	0
Advances made since the date of the bond ...	110	0	0
Paid before the Sub-Registrar	429	2	9
Total	1,500	0	0

The plaintiff has brought the present suit for a declaration that the defendant Mussammat Ved Kaur had no power of alienation, and that the sale would not bind him after her death.

Both the Courts below have construed the will as giving Mussammat Ved Kaur an absolute interest with full power of alienation to Mussammat Ved Kaur in half the property devised to her and the plaintiff jointly, and this is the principal question before us in this appeal. The second issue whether she had sold for necessity has not been decided.

There can be no question that the intention of the testator is to be gathered from the will as a whole, so that, as far as possible, every clause or word in it may have effect. This is what the lower Courts have professed to do. There is also no doubt of the correctness of the respondents' contention, as we understand it, that, with reference to that intention, we have to restrict ourselves to the actual language employed by the testator, or, in other words, the question is not what he meant, but what his words mean. We cannot give effect to what we conceive to be his real intention against the plain meaning of his language.

Subject to the above proviso, however, we consider it legitimate in construing the will, with reference to the bequest in Mussammat Ved Kaur's favour, to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It is rare to find females vested with power of alienation over immoveable property (the more so if it is ancestral) by Hindu Law or custom prevalent among Hindus in this Province. Ordinarily their ideas are repugnant to giving her such a power, and it may therefore be properly presumed, in the absence of clear indications to the contrary, that a devise of such property to a Hindu female does not confer an estate of inheritance, but only a life estate or a widow's estate, as understood by Hindu Law. We take this to be a well-established rule of construction, which should be applied in the present case, the deceased Dasu Mal having been a high caste Hindu and a resident of a town, though the property gifted is not ancestral. As already stated the ordinary presumption arising from Customary Law would probably be still stronger.

Respondents' counsel, however, insists that there is no such rule, and that no regard should be paid to any consideration of this description. We are unable to accede to this

contention, which, it may be observed, is irrespective of the provision in the will about alienation to which reference will be made hereafter, and is advanced on the authority of a recent Calcutta case *Lala Ramjewan Lal v. Dal Koer* (I. L. R., XXIV Calc., 406). In that case the testator in his will provided, *inter alia*, that his daughters and brother's daughters "shall be *maliks* and come in possession in equal shares of all the moveable and immoveable properties," that in the event of any of them dying childless her share "shall devolve in equal shares to the surviving daughters," "but such share shall have no connection with her husband's family." The will made a further provision that the daughters should not have on any account the right to alienate their shares. It was held that the word "*malik*" ordinarily implied an absolute gift, and that there was no authority for introducing into the will what was said to be the prevalent Hindu idea that a female ought not to obtain anything beyond an estate for her life-time; that the will was not open to the construction that it conferred only a life estate on the daughters, and that the limitations against the power of alienation were void. This was a will to which the Hindu Wills Act, XXI of 1870, applied, and in our opinion the decision is not applicable to the present case. Nor with all deference to the learned Judges, can we subscribe to their remark that there is no authority for the position that it is legitimate to construe the word "*malik*" or words to the same purport in a "devise by a Hindu" in favour of a female with reference to the prevalent notions among Hindus regarding the tenure of immoveable property by women. On the contrary there appears to be plenary authority for such a principle of construction. See *Soorjeemoney Dossee v. Denobundoo Mullick*, 6 M. I. A., 526, 550, in which their Lordships of the Privy Council say "Primarily the words of the will are to be considered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances no doubt must be regarded. Among the circumstances thus to be regarded is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning or a particular effect, it must be assumed that the testator, in the disposition he has made, had regard to that meaning or that effect, unless the language of the will or the surrounding circumstances displace that assumption." In *Kaonjbehari Dhur v. Prem Chand Dutt*, I. L. R., V Calc., 684, a

devise of immoveable property to the testator's wife and his daughter's sons in specified shares with power to the wife to adopt a son, was held to confer on the latter merely a life interest by construing the words of the gift with reference to the provisions of the Hindu Law. In *Mahomed Shumsool Hooda v. Shewuk Ram*, L. R., 2, I. A., 7, their Lordships of the Privy Council observe : "In construing the will of "a Hindu, it is not improper to take into consideration what "are known to be the ordinary notions and wishes of Hindus "with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and "it may be assumed that a Hindu knows that, as a general rule "at all events, women do not take absolute estates of inheritance which they are enabled to alienate." The above rule was followed in *Punchoo Money Dossee v. Troylucko Mohiney Dossee*, I. L. R., X Calc., 342, in interpreting the words "My "wife K is the *malik* thereof " to mean not an absolute estate capable of alienation. See also *Hira Bai v. Lakshmi Bai*, I. L. R., XI Bom., 573, where the same principle was approved and acted on.

The other cases quoted by respondents' counsel do not lay down anything to the contrary. In *Lalit Mohun Singh Roy v. Chukkun Lal Roy*, I. L. R., XXIV Calc., 834, the facts were different, and nothing in favour of respondents' argument can be deduced from the judgment. The word "*malik*" in the will in that case was used with reference to a male. The same remark applies to *Vydinada v. Nagammal*, I. L. R., XI Mad., 258, but in page 260 the learned Judges in discussing the Bombay case above cited appear to assent to the rule of construction there adopted that "it was repugnant to general "Hindu custom that the testator intended to give his widow "more than the qualified interest of a Hindu widow in her "moiety."

We therefore over-rule the contention, and proceed to the interpretation of the will taking the above rule as one of our guides. Of course the actual meaning of the words employed is the most important matter for consideration. The present will, however, is badly drawn, apparently by a person who had no knowledge of drafting and whose acquaintance with the Urdu language was imperfect. The words upon whose interpretation the decision of the suit depends are these :—

Aur bad wafat mere bamujib tafsil mundari a zail har ek waris malik mutasarrif jo makan jinke nam par likh diye gaye hain, bad mere wafat ke unko ikhtiar hoga ke amdani kiraya se aukat basri kare, ya bamarzi jiske pas chahe rahan, bai intik kar de, donon men koi kissi ka muzahim wa mutariz na hoga.

The whole clause is badly expressed, and in consequence of its involved language, repetitions and bad grammar, a literal interpretation of the words used would land us in inconsistencies and absurdities. In the beginning the testator is seemingly speaking of each heir individually, but the pronouns used are plural ones, though the verbs are not, and then he winds up by saying that neither of the two would have any power to interfere with, or object to, the action taken by the other with respect to the property given to that other. It is contended by the appellant that the legatees are divided by the testator into two groups, and that his intention in this clause is only to provide that each group will have the fullest power of enjoying the income of the property gifted to it, and of alienation at pleasure without reference to, or power of interference by, the other. The bequests are certainly on this principle, certain properties being given to plaintiff and Mussammat Ved Kaur, and certain others to the testator's wife and daughter, and the tenor of the will is to keep the two groups distinct. The objections to this construction lie in the words "*her ek*" and "*waris*," both of which mean individual heirs; but, on the other hand, the pronouns that follow are in the plural number though the verbs are singular. But there would be no impropriety if each group is treated as a unit, and the plural pronouns would not in that case be an insuperable difficulty.

It is perhaps unfortunate that the interpretation of the testator's intention should necessitate a minute and critical examination of the clumsy sentences and imperfect grammar of an ignorant scribe, but the interpretation does not rest on this only, but on other and more substantial grounds as well. If the testator meant to refer to each of his heirs individually, it is curious that he did not make his bequests in the same way. A cursory glance at the first portion of the clause quoted might seem to show that he did so, but in fact there is no property bequeathed to any one individually, which could be separately enjoyed or disposed of at his pleasure. The legatees were divided into two groups, each consisting of two persons, and to the persons of each group jointly

items of property were gifted. Separate enjoyment and disposition required at least a separation of their interests. Again the divisions were natural, each group was formed of a mother, natural or adoptive, and a child, and the latter in both groups were minors, incapable of taking care of their bequests, and the testator evidently regarded the interests of mother and son in each case as identical and made them joint bequests. Naturally his attention was not directed to his legatees individually, but in groups, and his provisions were directed to prevent friction and mutual interference between these. Both the Courts below admit that the word "*dono*" does refer to the groups, but the District Judge says it also means something more, *viz.*, that it prohibits interference *inter se* between the members of each group, but this is not to be found in the words but has to be added. The Divisional Judge reads the clause without the sentence beginning with "*donon men.*" In this way of course the remainder more readily admits of the interpretation he has put on it, but his method is open to the objection he himself makes to the construction of the other party, *viz.*, that it does not read the different parts of the will together. There can be no doubt that this sentence is intimately connected with the previous one. He then interprets the sentence by itself and puts into it a meaning its words do not bear, *viz.*, that the members of each group are also not to interfere with each other. Finally the plaintiff stood to Dasu Mal in the relation of a grandson, while Mussammat Ved Kaur was a widowed daughter-in-law. While therefore Dasu Mal would do everything to secure her maintenance for life, there is no special reason why he should give her power to transfer any of his immoveable property to others. It would scarcely be reasonable to suppose that he would put plaintiff and Mussammat Ved Kaur on the same footing. The latter as a Hindu widow was expected to live simply and devote herself to pious ways and her needs therefore were few, while plaintiff would grow up, marry and become the head of a new family. We therefore think it more likely that Dasu Mal meant to give Mussammat Ved Kaur only a life estate or a widow's estate. As the words used on the whole admit of this interpretation, it ought to have preference. The word *malik* on this construction would have no bearing in her favour. The case reported in Volume X of the Calcutta Series, and the other authorities already referred to, would show that it is not a necessary result from the use of the term in respect of a Hindu female to whom a bequest is made, that

she should be considered the absolute owner, and we are prepared to adopt the same view in this case.

On this finding on the first issue, it is necessary to go into the second, which has not been decided by either of the Courts below. The parties however have produced all their evidence, and it is not urged that any evidence has been excluded. We think it right therefore to save the parties the trouble of a remand simply for the purpose of a finding when no further inquiry is needed.

The *onus* of proof on this issue is exclusively on the defendants. They have produced evidence as to the payment of consideration, but practically none to show the extent there was necessity for the advances made. Mussammat Ved Kaur has not gone into the witness box herself, and the only lawful necessity that we can find for her borrowing money was the partition case. Even here she was decreed Rs. 169 as costs, out of which she realized Rs. 143 from the plaintiff on 6th October 1893, more than a year before the sale. The pleaders called by the defendants give no definite evidence, and the notice issued by Mussammat Ved Kaur on 2nd July 1894 to pre-emptors offering to sell the property in dispute mentions no necessity. In short there is no tangible proof of necessity. Neither the marriage of *Tulsi*, nor that of her sister's daughter, can be held to be occasions for lawfully contracting debts on the security of immoveable property on the part of Mussammat Ved Kaur. Her account in the vendee's book shows that nearly Rs. 1,000 were advanced to her in less than four years, while she was able to get on without debt for ten years after Dasu Mal's death. The case for the defendants is so obviously weak on the second issue that their counsel contented himself, in reply to appellant's arguments, with simply saying that the opinion of the lower Courts had not been given on the evidence. We are practically obliged therefore to find against them on that issue.

We accept the appeal and, setting aside the decrees of the lower Courts, decree the plaintiff's claim with costs in all the Courts.

Appeal allowed.

No. 28.

Before Mr. Justice Chatterji and Mr. Justice Clark.

MIR KHAN,—(JUDGMENT-DEBTOR),—APPELLANT,

APPELLATE SIDE. }

Versus

JIWE KHAN,—(DECREE-HOLDER),—RESPONDENT.

Case No. 1286 of 1896.

Civil Procedure Code, 1882, Sections 231, 244—Application for execution of whole decree by one of several joint decree-holders—Dismissal of application—Appeal.

An application for execution of the whole decree was made, under Section 231 of the Civil Procedure Code, by one of four joint decree-holders, but was dismissed by the District Judge on the ground that the decree could not be executed until all the decree-holders joined in the application. It appeared that the judgment-debtor was not summoned to defend the application, but on appeal from the District Judge's order he was impleaded as well as the other co-decree-holders. The Divisional Judge ordered that the execution should proceed on the applicant joining with him such of his co-sharers as were willing to execute the decree jointly with him, and impleading the rest who objected and declined to take out execution, and that the Court should take possession of the entire land decreed, and separate off the shares of the applicants from those of the others through the agency of the Collector. The judgment-debtor appealed to the Chief Court, and it was contended on his behalf that the order of the District Judge under Section 231 of the Code was not appealable, and that therefore, the order of the Divisional Judge was without jurisdiction and void.

Held, following *L. R., XVII Mad., 394*, that the Divisional Judge had jurisdiction to hear the appeal.

Although, if an application under Section 231 of the Code is dismissed without summoning the judgment-debtor or issuing process, and the latter is not made a party to the appeal, the question may be one beyond the province of the Appellate Court to adjudicate upon, yet if, as in the present case, the judgment-debtor is impleaded on the appeal, the question then becomes one under Section 244 of the Code, and an appeal lies.

The Court refused, under the circumstances of the case, to interfere with the order of the Divisional Judge on the merits.

Miscellaneous appeal from the order of Khan Muhammad Hayat Khan, C.S.I., Divisional Judge, Jullundur Division, dated 15th August 1896.

Muhammad Shafi, for appellant.

Sant Ram, for respondent.

The judgment of the Court was delivered by

22nd Feby. 1898.

CHATTERJI, J.—In this case a decree was passed by this Court subject to a restriction, which is not now material, in

favour of the respondent Jiwe Khan and four others for proprietary possession of 138 *kanals* 16 *marlas* of land, *khevat* Nos. 18 and 2, in *mauta* Sanwana. This was on 5th March 1896.

Jiwe Khan applied for execution of the whole decree under Section 231, Civil Procedure Code, in the Court of the Additional District Judge. The other decree-holders did not join, and an objection appears to have been made on behalf of one of them, Ghulam Muhammad, a minor. The Court held that the decree could not be executed until Jiwe Khan's co-sharers joined and dismissed the application. The judgment-debtor Mir Khan appears not to have been summoned to defend the application.

On appeal Mir Khan was impleaded as well as the other co-decree-holders, and the Divisional Judge ordered that the execution should proceed on Jiwe Khan joining with him such of his co-sharers as were willing to execute the decree jointly with him and impleading the rest who objected or declined to take out execution, and that the Court should take possession of the entire land decreed, and separate off the shares of the applicants from those of the others through the agency of the Collector.

From this order the present appeal has been filed by the judgment-debtor.

The first ground of appeal is that the order of the Additional District Judge under Section 231, Civil Procedure Code, was not appealable, and that the order of the Divisional Judge is without jurisdiction and void. The case of *Gooroo Doss Roy, decree-holder, v. Ram Runginee Dossia*, XVII W. R., 136, is quoted in support of this contention as well as another reported in page 415 of the same volume in which it was followed. The other side quotes *Lakshmi Ammah v. Ponnassa Menon, &c.*, I. L. R., XVII Mad., 394, where the contrary was ruled.

The cases cited on appellant's behalf were decided under Act VIII of 1859, but the provisions relating to execution by some out of several decree-holders and those regarding appeal from orders in execution in that Act and in the present Code of Civil Procedure are very similar, and the cases are, therefore, authorities bearing on the question before us.

There are, however, material differences in the facts of this case and of that reported at page 136, W. R., Vol. XVII, which is the precedent relied on by appellant. In the latter

the judgment-debtor was no party to the appeal and the contest was simply between two joint decree-holders. Here the judgment-debtor was a party and was the person who primarily defended the appeal. In the second case quoted by the appellant the judgment-debtor appears to have been impleaded, but no notice was taken of this fact and the reasoning of first case was simply followed. It may therefore be put out of consideration.

After giving the matter our best consideration, we are of opinion that the view taken by the Madras Court is the sounder one and should be followed. It is very possible that, if the contest is merely between joint decree-holders, there would be considerable force in the reasoning of the Calcutta Court. Section 231 is one relating to execution of decrees, and there can be no execution without the judgment-debtor being a party to the proceedings. Where a dispute is between joint decree-holders alone without reference to the judgment-debtor, the proceedings cannot properly be called proceedings in execution.

In fact we conceive the provisions of Section 231, Civil Procedure Code, do not primarily contemplate the settlement of disputes between joint decree-holders, for it imposes on the Court the duty of taking measures for the protection of the interests of the persons who do not join in the application for execution. If they actually appear, they can take steps to protect themselves, either by joining in the application or definitely refusing to do so, in which case, if the shares of the decree-holders can be ascertained, execution can proceed as regards the interests of those who wish to enforce the decree. For we do not take Section 231 to positively lay down that, in the case of a joint decree, there can be no execution except for the whole, but to be merely an enabling section providing a procedure for some out of several decree-holders executing the entire decree. (See *Brojeswari Chowdhralee v. Tripoora Soodere Debi*, III Cal., L. R., 513 ; *Hurrish Chunder Chowdhry v. Kalisunderi Debi*, I. L. R., IX Cal., 482, P. C., in which partial executions were allowed, and particularly the remarks of their Lordships of the Privy Council in the latter case at page 494). Another reason for our view, that Section 231 is not intended to apply to disputes between decree-holders, is that such disputes can only be finally settled in a regular suit, and not in execution of a decree against a third party. Section 231 therefore is primarily intended to facilitate execution in cases where the decree is a joint one in favour of several persons, and in all such

proceedings the judgment-debtor is necessarily a party. He can appear when process issues against him in execution of a joint decree and object to the order under Section 231, and the Court will be bound to listen to him. For example, he may urge that he has acquired the rights of some of the decree-holders, and that the whole decree cannot, therefore, be executed against him. This undoubtedly will be a question between the parties to the suit, and relating to the execution of the decree or discharge or satisfaction thereof, within the meaning of Section 244. See *Kudhai v. Sheo Dayal, I. L. R., X All., 570*. The decision of the executing Court will undoubtedly be subject to appeal.

It may be that, if an application under Section 231 is dismissed without summoning the judgment-debtor or issuing process, and the latter is not made a party to the appeal, the question may be one beyond the province of the Appellate Court to adjudicate upon. But where as in this case the judgment-debtor is a party, the question becomes one under Section 244, and an appeal lies. It was the judgment-debtor who contested the appeal in the lower Appellate Court, and it is he who is fighting the decree-holder here. We do not think he was improperly made a party to the appeal in the Divisional Court and no such objection has ever been urged by him. We therefore follow the Madras authority and hold that the Divisional Judge had jurisdiction to hear the appeal.

We do not see any necessity for interference with the order of the Divisional Judge on the merits. If Ghulam Muhammad objected to the execution before him, it is possible that he was wrong in ordering execution to issue for the whole decree, but since his order, a fresh application has been made, in which other decree-holders have joined, and the decree is now said to be fully executed. A *dakhaltama* has certainly been filed and attested. Mr. Muhammad Shaü says this is a fictitious document, and that Ghulam Muhammad's guardian put in a petition disclaiming execution, which was returned as the record was in this Court. As we do not fully know the facts, and as, in any case, a fresh joint application was a good authority for executing the decree as a whole, we do not wish to pass any order, which would have the effect of unsettling the completed acts of the execution Court. But our order will be without prejudice to the judgment-debtor, or any decree-holder who has not really joined in the new application to show the real facts. The execution Court will have full authority to inquire how far execution has been really carried

out this being one of the appellant's objections, and to pass any order which is necessary in the ends of justice. If appellant is actually in possession still, and Ghulam Muhammad will not dispossess him, we do not see that he really requires an order from us to protect him. He can of course maintain his possession.

For the above reasons, we uphold the order of the Divisional Judge and dismiss this appeal. But the circumstances being peculiar, we direct that the parties pay their own costs throughout.

Appeal dismissed.

No. 29.

Before Mr. Justice Stogdon and Mr. Justice Chatterji.

APPELLATE SIDE. }

HIRA SINGH AND OTHERS,—(DEFENDANTS),—APPELLANTS.

Versus

SHER SINGH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Case No. 312 of 1896.

Mortgage by widow—Decree of foreclosure against widow—Regulation XVII of 1806—Regularity of proceedings, presumption as to—Suit by reversioners for recovery of land after death of widow—Limitation Act, 1877, 2nd Schedule, Article 141—Res judicata—Estoppel.

Held, that as against a person in possession of land under a title created by a widow, or in virtue of a decree for possession obtained against a widow, the reversioners have, under Article 141 of the Limitation Act, twelve years from the date of the widow's death within which they can sue for recovery of the land.

Held, further, that where a suit is brought against a female heiress in possession in respect of any matter which strikes at the root of her title to the property, a decree fairly and properly obtained against her binds all the reversioners, but, inasmuch as the widow's estate is ordinarily a limited one, and as she represents the reversioners only in special cases, in order that such decree should bind the latter, it must be shown, in the first instance, that the litigation was one in which the entire interest in the estate she held in possession was at stake, and then, that she had sufficiently protected the reversioner's interests, and that there was a fair and proper inquiry.

A widow's position with reference to the reversioners' interests is like that of a trustee, and any failure or neglect on her part to defend those interests in any such litigation render a decree obtained against her valueless against the reversioners.

Where certain mortgagees had, during the widow's life-time, obtained a decree of foreclosure against her under Regulation XVII of 1806, *held*, that as against the reversioners, who sued for recovery of the land after

the death of the widow, the *onus* of proving that the said foreclosure proceedings were in due form and that the right of redemption was extinct, was on the mortgagees, there being no presumption in favour of the regularity and propriety of such proceedings.

A plea of estoppel by conduct, *held*, not established.

Further appeal from the order of Khan Muhammad Hayat Khan, C.S.I., Additional Divisional Judge, Amritsar Division, at Jullundur, dated 25th-26th February 1896.

K. P. Roy, for appellants.

W. H. Rattigan, Q. C., and Shelverton, for respondents.

The facts of the case are fully stated in the following judgment delivered by

CHATTERJI, J.—The material facts of this case are shortly 29th March 1898. these:—

The plaintiffs are admittedly the male reversionary heirs of one Nihal Singh, a Jat of Rattangarh, in the *tahsil* and District of Amritsar, who died childless, leaving a widow, Mussammat Sobhan, about twenty-six or twenty-seven years before suit. Mussammat Sobhan succeeded to the land, and on 19th April 1872 she mortgaged it with possession to Partap Singh Bawa, father of the appellants, for Rs. 360 by way of conditional sale after a term of three years. On 8th January 1877 the mortgagee applied for issue of notice of foreclosure. On 14th August 1877, a report of service having been made, the proceedings were consigned to the record room. On 7th May 1879 the mortgagees sued for foreclosure, the year of grace having expired, against Mussammat Sobhan. The 5th June was fixed for her appearance for settlement of issues, but she appeared on the 7th after the case had been adjourned to the 16th June, and her statement was recorded. On the 16th June the case was not taken up, but on the 17th she filed a *jawab-dawa* denying receipt of consideration. No issues were framed, but a decree was passed in the mortgagee's favour on that date.

In April 1887 some of the present plaintiffs brought a suit for a declaration that the widow's alienation would not affect their reversionary rights, as it was without consideration. The claim, however, was dismissed as barred by time. The widow was then alive.

She being now dead, the plaintiffs brought the present suit for recovery of the land on the allegation that the mortgage was not binding on them, as it was fictitious one, and without consideration.

The defendants pleaded that the claim was barred by the suit of 1887 and by limitation, and that the mortgage was for lawful necessity and valid. It was also pleaded that the plaintiffs had been cultivating the land as defendants' tenants, and could not therefore challenge their title.

The first Court framed issues as to (1) the bar of the former suit, (2) bar of limitation, (3) estoppel by reason of tenancy, and (4) validity of the mortgage by Mussammat Sobhan. It decided the first two in plaintiffs' favour, but the last in defendants', and also held that plaintiffs, by cultivating the land under defendants, had in a manner consented to the alienation. It therefore dismissed the suit.

In the Court of Appeal the plaintiffs abandoned all contention as to the mortgage having been executed without necessity, and asked for redemption on payment of the mortgage money stated in the deed. They further objected to the validity of the foreclosure decree in 1879. The Divisional Judge permitted them to change their ground as regards the validity of the mortgage, and remanded the case under Section 566, Civil Procedure Code, for inquiry into, and report upon, the issue he framed, *viz.*, whether the litigation in the foreclosure suit was *bonâ fide*, and whether there was a full and fair trial in it.

The return of the lower Court was in defendants' favour, but the Divisional Judge in an elaborate judgment disagreed with its finding, and held (1) that the plaintiffs could challenge the foreclosure decree at that stage; (2), that there was no fair trial, and the decree therefore was not binding on plaintiffs, (3) that there was no proper foreclosure, and the right of redemption was therefore not extinct; and (4) that no estoppel was established against the plaintiffs by reason of some of them having been defendants' tenants in respect of the land in suit. He decreed the plaintiffs' claim for possession on payment of the principal amount Rs. 360 entered in the mortgage deed. From this decision the defendants appeal, and the case was argued for them on substantially the same grounds as were urged in the Court below. It was also contended that the claim is barred by time, owing to the adverse possession of the defendants since the decree of 1879, though this point is not taken in the written grounds of appeal.

I do not think that the objection that plaintiffs should not have been allowed to change their ground, and to claim redemption on payment of the full sum entered in the deed

of mortgage, is of much force. The Divisional Judge had a discretion in allowing them to take up a point not urged in the lower Court, or in the grounds of appeal, and it cannot be interfered with by us, except on cogent grounds and for the ends of justice. There are no such grounds in the present case. The plaintiffs never admitted the correctness of the decree of 1879, but sued for possession, ignoring it altogether. They claimed possession without payment, alleging the mortgage to have been made without consideration or necessity, but had necessity or consideration been established, the suit could not have been on that account, according to the practice usually followed in Indian Courts, dismissed altogether. It would still have been proper to decree redemption on payment of the sum found to have been validly raised by the widow, unless it was also found that the right of redemption was extinct, by reason of the mortgage having been converted into a sale. In order to go into this question, it would have been necessary to record the pleadings of the parties, and to inquire into the validity of the decree, if the plaintiffs objected to it. The point was thus an obvious one, which had been lost sight of by the parties, who were fighting the case on other issues. As soon as plaintiffs admitted the validity of the mortgage deed, the necessity of going into the question became manifest, and I consider the Divisional Judge acted in the interests of justice in allowing it to be raised. The defendants were entitled to a full inquiry when it was taken up, and such an inquiry has been made by order of the Divisional Judge. I may note that the defendants themselves did not rely on the decree of 1879 in the first Court at least so much as the decree of 1887. I would accordingly over-rule this contention.

The question of limitation may next be discussed. It is claimed that the defendants had adverse possession against the widow from the date of the decree, and that the plaintiffs' claim is therefore barred. The claim of the defendants was under an alienation made by the widow herself, and it has been uniformly ruled, from the time Act XIV of 1859 was enacted up to the present, that as against a person in possession under a title created by the widow, the reversioner is not barred, if he sues within twelve years from her death, *Nobin Chundar Ohuckerbutty v. Issur Ohunder Ohuckerbutty* (IX, W. R., C. R., 505, F. B.) and other cases on this point collected in Mr. Justice Rivaz's judgment, *Punjab Record*, No. 74 of 1895, pages 361, 362. His own opinion is that it is unquestionable that in such cases the collaterals have under Article 141, Act

XV of 1877, twelve years from the date of the widow's death. I did not understand this proposition was controverted by the learned counsel for the appellants. The cases quoted by him relate to a different point, viz., that the possession of a trespasser against the widow, which lasts long enough to bar her claim, also bars the reversioner, and that, in such cases, the limitation running against her runs against the reversioner, also *Luchhan Kunwar, &c., v. Manorath Ram* (I. L. R., XXII Cal., 445, P. C.); *Tika Ram v. Shama Charn* (I. L. R., XX All., 42) approving of *Hanuman Prasad Singh v. Bhaguati Prasad* (I. L. R., XIX All., 357). No case was quoted in which limitation was successfully pleaded against the reversioners by a person holding under a title created by the widow.

The cases in which reversioners have been held to be bound by a decision in a suit against the widow, on the point of limitation or any other, appear to be clearly distinguishable. If the proposition is true that, as regards titles created by the widow, the reversioner is allowed, by Article 141, twelve years from her death to bring his suit, I am unable to see how limitation can be affected by the fact of the alienee getting a decree against the widow. If she sells and gives possession, limitation does not run against the heir. If she refuses to give possession, and the vendee sues and gets a decree for possession, the vendee cannot be in a better position as regards limitation. In cases in which the alienation is proper, it binds the whole estate, but this is due to the nature of the widow's act. The heir is bound even at the date the transaction takes place. If adverse possession can be said to run in such cases, it must arise from the nature of the act, and not simply where the alienee has obtained a decree against the widow. Many such decrees do not bind the reversioners, and in such cases there is no adverse possession. In my opinion this ground also must fail.

The main point in the case is whether the plaintiffs are entitled to go behind the foreclosure decree of 1879. The law on the subject is well summarized by Mr. Mayne in the following passage. Where a suit is brought by or against a female heirress in possession in respect of any matter which strikes at the root of her title to the property, it is held that a decree, fairly and properly obtained against her, binds all the reversioners, because she "completely represents the estate," Hindu Law, 5th Edition, Section 605. Mr. Roy objects to the words

“fairly and properly,” and contends that such a decree is binding on the reversioners in the absence of fraud or collusion or except on special grounds, and that the authorities do not go further. He quotes the *Shiva Ganga* case IX. M. I. A. 539, at page 604. The words “fair trial” occur in that very judgment, and the principles laid down in it have been adhered to ever since. See *Hari Nath Chatterjee v. Mathur Mohan Gowami*, I. L. R., XXI Calc., 8, at page 17; *Brommoye Dasse v. Kristo Mohun Mookerjee*, I. L. R., II Calc., 222; *Pertabnaraiah Singh v. Trilokinath Singh*, I. L. R., XI Calc., P. C., 186, at page 197; *Sant Kumar v. Deosaram*, I. L. R., VIII All., 365; *Punjab Record*, 8 of 1884 and 139 of 1888. Counsel tried to restrict the operation of the rule to cases of fraud and collusion, probably relying on the language of Mr. Justice Rivaz in No. 74 of 1895 at page 360. But Mr. Justice Rivaz was not laying down a comprehensive doctrine on the subject, but giving what he thought was the gist of the *Shiva Ganga* case. It seems to me that Mr. Mayne’s summary is correct, and that Mr. Roy’s contention cannot be accepted.

As regards the question on whom the *onus* of proof should lie to show whether the trial has been a full and fair one, the answer must depend upon circumstances. The widow’s estate is ordinarily a limited one, and she represents the reversioners only in special cases. It would have to be shown, in the first instance, that the litigation was one in which the entire interest in the estate she held in possession was at stake, and then, in order to bind the reversioners, that she sufficiently protected their interests, and that there was a proper and fair inquiry. Once the *bonâ fide* character of the litigation is established, and that the widow contested the case properly, the result will bind her as well as those who succeed her. In a suit springing from the widow’s own alienation it is rarely possible for her to protect the rights of the reversioners, for she cannot in any case challenge the validity of her act, and the Court would not be bound to go into any issue regarding it. In the present instance, however, it was possible for her, without denying the binding character of her mortgage, to contest the foreclosure suit on the ground that there was no proper notice served on her, or on any ground that vitiated the foreclosure proceedings. The mortgage is now admitted to have been made for necessity. The widow’s act so far therefore binds the reversioners, and, if the foreclosure has properly taken place, their rights are extinct. The question,

whether there has been a fair and proper trial of the issues arising in that suit, is one which thus properly arises in this suit, but must be considered independently of the fact that the mortgage was validly made.

All discussion regarding the *onus* of proof is practically of little consequence in this suit, because there is no difficulty in deciding whether the decree in the foreclosure suit was a fair and proper one. In my opinion so far from the trial in that suit being fair and proper, there was no trial at all. The Court's procedure teems with irregularities. The widow, who was old and decrepit at the time, made no effort to protect the reversioners' rights, nor even her own, and the decree was passed without drawing any issues or making any inquiry. The record shows that the 5th June 1879 was fixed for settlement of issues, but by mistake a summons on a form for final disposal with partial corrections was issued. On the 5th Mussammat Sobhan did not appear, and the hearing was adjourned to the 16th in order that the proceedings under the Regulation might be examined. She appeared on the 7th and asked to be allowed to make her statement as she was very old. She was permitted to do so, and denied receipt of consideration, but admitted that she had got a notice in 1877. The case appears not to have been taken up on the 16th, and on the following date the widow put in her *jawab-dawa* which was to the same effect as her first statement, on which the presiding Judge passed a decree in favour of the then plaintiffs giving as his reasons that the day was fixed for evidence, but she had not any in readiness, and that *prima facie* plaintiffs' claim appeared to be good. Now, in fact the issues had never been drawn, and no date had been fixed for hearing of evidence. The Court was entirely under a misapprehension on these points. Mussammat Sobhan did not raise any defence in relation to the foreclosure proceedings, but she pleaded that she had been over-reached, and denied receipt of consideration, but this was not put in issue and enquired into. It can scarcely be said that the widow's conduct showed any consciousness of the duty she owed to the reversioners to protect their rights and in the absence of any statement made by her, from which the regularity of the foreclosure proceedings may be legitimately inferred, and further in consequence of the Court's failure to question her regarding them properly, and its haste and error in disposing of the suit, it cannot be said that there was any trial, much less a fair one, of the questions that arise in such a case, so as to bind the reversioners. The

widow whether from ignorance or old age entirely neglected the conduct of the suit. Her position with reference to the reversioners' interest in the estate held by her was like that of a trustee, and her failure and neglect to defend those interests render the decree valueless against the reversioners.

Mr. Roy admitted that gross neglect on her part would be tantamount to constructive fraud.

. On the whole, I am of opinion that the decree of 1879 does not make the present claim *res judicata*. The respondents therefore must be relegated to the position of mortgagees, who have got a valid mortgage from the widow, and who have issued notice of foreclosure under the Regulation of 1806. It is open to them to show in this suit that the foreclosure proceedings were in due form, and that the right of redemption is extinct.

I think the *onus* of proving this issue is entirely on the respondents. The notices themselves have been destroyed, but this is a piece of misfortune which cannot be helped. No presumption can be made in favour of the regularity and propriety of the foreclosure proceedings. *Punjab Record*, 24 of 1895, page 97, 139 of 1882. Nor can I regard the oral evidence produced on remand as of any value whatever. Mussammat Sobhan no doubt in 1879 admitted having received a notice, but this was not enough. It was necessary to prove very much more before the right of redemption could be said to be extinguished. Neither the file of the notice proceedings, nor that of the foreclosure suit, show that the imperative conditions of the Regulation were fulfilled. For example, it is not shown that a demand previous to the application for issue of the notice was made, or that a copy of the application was served with the notice. I have no difficulty in finding on this issue in favour of the plaintiffs.

As regards estoppel there is no sufficient ground to hold it established against any of the plaintiffs. It is not shown that any of them was actually a tenant of the defendants when the suit was brought. It is true that most of them have cultivated the land under defendants off and on, but from this it cannot be inferred that they have foregone their rights of ownership. A suit was brought by the plaintiffs in 1887, which showed that defendants' title was not undisputed. The first Court which decided in favour of the defendants did not find estoppel proved, but was of opinion that from the plaintiffs' conduct

it could be inferred that they had in a manner sanctioned the widow's alienation. There is, however, no sufficient proof that the plaintiffs at any time accepted the widow's alienation as valid and binding on them. The plaintiffs are therefore entitled to redeem the land on payment of Rs. 360.

The respondents have held the land as ostensible owners since 1879, but the case of 1887 and some objections made at the time of mortgage ought to have warned them that their title was not beyond question. All things considered, however, I think the parties ought to bear their own costs throughout.

I would dismiss the appeal but without costs.

Appeal dismissed.

No. 30.

Before Mr. Justice Frizelle.

HAKIM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

*Versus*NADIM GUL AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 198 of 1898.

Civil Procedure Code, 1882, Section 43—Application to Revenue Officer for partition of land—Question of title decided by said officer—Subsequent suit for possession of house—Title to land and house identical—Punjab Land Revenue Act, 1887, Section 117.

In previous partition proceedings, relating to certain land and between the parties to the present suit, the Revenue Officer, before whom the proceedings were instituted, passed an order under Section 117 of the Land Revenue Act, to the effect that he would himself inquire into and determine the question of title that had been raised. Subsequently the present plaintiffs filed an application, upon which they paid the full stamp necessary for a civil suit, but which was not in the form of, or verified as, a plaint, and contained no statement of claim beyond a reference to the said order, and a statement that a separate suit would be brought for possession of a house connected with the land. The application was, however, registered in the register of civil suits, the order that it should be so registered and the summons issued being signed by the said officer, who was an Extra Assistant Commissioner, as "Munsif, 1st class." The officer then proceeded under Section 117 (2) (b) of the Land Revenue Act, and gave plaintiff a decree in respect of the land, the judgment being signed by him as "Assistant Collector," and the decree as "Munsif, 1st class." Plaintiffs having subsequently sued for possession of the house mentioned in their said application, defendants pleaded that the suit was barred under Section 43 of the Civil Procedure Code, on the ground that the decree in the partition proceedings had been passed by the Extra Assistant Commissioner, purely in the exercise of his civil powers as a Munsif, 1st class, and that therefore the claim to the house could have been made before him and determined in those proceedings. It was admitted that plaintiffs' title to the land and to the house was the same.

Held, that the Extra Assistant Commissioner had clearly intended in the partition proceedings to act under Section 117 (2) (b) of the Land Revenue Act, as a Revenue Officer, and that his jurisdiction was confined to the question of title to the land which alone was the subject of those proceedings.

Held, therefore, that inasmuch as no claim to the house could have been included in the former proceedings, the present suit was not barred under Section 43 of the Civil Procedure Code.

Further appeal from the order of H. Maude, Esquire, Divisional Judge, Peshawar Division, dated 16th June 1899.

Muhammad Shah Din, for appellants.

Janki Nath Kaul, for respondents.

The judgment of the Court was delivered by

17th Feby. 1898.

FRIZELLE, J.—The Divisional Judge has dismissed this suit under Section 43, Civil Procedure Code, on the ground that, in a partition proceeding previously pending between the parties, when a question of title was raised and inquired into, and decided, the claim to the house now in dispute should have been made. In that proceedings the first Court as a Revenue Officer, on 27th January 1896, passed an order that he would himself determine the question of title that had been raised. This order was passed under Section 117 of the Land Revenue Act, and the Revenue Officer then proceeded under sub-section 2 (b) of that section and gave a decree in plaintiffs' favour. That inquiry and decree only referred to the land, which was the subject of the partition proceedings, and did not include the house now in dispute. Plaintiffs' title to the land and the house is admittedly the same, but, in the partition case which the Revenue Officer tried as a Civil Court, no claim to the house could have been included. I therefore think the present suit is not barred by Section 43.

It is contended for respondents that this decree of the first Court was passed purely in the exercise of its civil powers as Munsif of the first class, and that therefore the claim to the house could have been then made and determined. From examination of the record, I find that, after the Revenue Officer (Lala Mangal Sain, Extra Assistant Commissioner) had passed his order under Section 117, plaintiffs filed an application referring to the previous order, and on this application full stamp was paid. This application was registered in the register of civil suits, and the order that it should be so registered and summons issued was signed by the Extra Assistant Commissioner as "Munsif, 1st class." He signed the judgment as Assistant Collector and the decree as Munsif, 1st class. But the officer was the same throughout. I think it was merely a mistake signing as Munsif. He clearly intended to act under sub-section (2) (b) as a Revenue Officer, merely observing the procedure laid down for Civil Courts, and his jurisdiction was confined to the question of title raised in the revenue proceedings, namely, the title to the land.

Although plaintiffs filed a separate application after the order of the 27th January, and the application was on the full stamp necessary for a civil suit, it was not in the form of a plaint, it was not verified as a plaint, it contained no statement of the claim beyond a reference to the order of 27th January,

and expressly stated that a separate suit would be brought for a house connected with the land, that is, the house now sued for.

I accept the appeal ; set aside the Divisional Judge's order and remand the case to him for decision of the appeal on the merits. Stamp to be refunded. Other costs to be costs in the case.

Appeal allowed : cause remanded.

No. 31.

Before Mr. Justice Stogdon and Mr. Justice Chatterji.

MALIK RAHIM BAKHSH AND OTHERS,—

(DEFENDANTS),—PETITIONERS,

Versus

MUSSAMMAT FAKHAR-UN-NISA,—(PLAINTIFF),—
RESPONDENT.

MISCELLANEOUS
SIDE.

Case No. 269 of 1897.

Res judicata—Cross suits relating to same subject-matter, and involving identical issues tried together—Findings on issues in both judgments identical—Appeal from judgment in one case only—Civil Procedure Code, 1882, Section 13.

Where two cross suits, relating to the same subject-matter and giving rise to identical issues, are tried by the same Court, and it cannot be urged that there is a bar to the trial of the issues by the Court in either case, an Appellate Court is not precluded from adjudicating on those issues, if one judgment is appealed and the other is not, by the operation of the latter judgment under the rule of *res judicata*, though the findings on the issues in both judgments are identical.

I. L. R., XVI Calc., 233, followed ; I. L. R., VI Calc., 319, not followed ; I. L. R., XI All., 148, distinguished.

A decision on a point, which is decided, but which is not necessary for the decision of the suit, which is disposed of on another point, cannot operate as *res judicata*.

Where a plaintiff brought her own suit, in which the question of her right necessarily and directly arose, *held*, that she could not be held to have acquiesced in the same issue being treated as a material one in another suit, in the same Court, in which she was impleaded only as a member of the family, the two suits being tried together.

* *Application for review of the judgment of the Chief Court,
dated 16th March 1897.*

K. P. Roy and Jaishi Ram, for petitioners.

*The judgment of which a review was prayed, is reported as No. 23, *Punjab Record*, 1897.—Ed., *Punjab Record*.

The petition for review of judgment was rejected by the following judgment delivered by

24th Feby. 1898.

CHATTERJI, J.—This is an application by Malik Rahim Bakhsh and Malik Kadir Bakhsh, two of the defendants-respondents, for review of a judgment, which has been published as No. 23 in the *Punjab Record* for 1897. All the points arising in the case were exhaustively considered in that judgment, and the review seeks to re-open almost every point decided in it. The learned argument for the petitioner took up the greater part of two days, and most of it was addressed to the question of *res judicata*, which was taken as a preliminary objection at the original hearing and overruled. This point must first be discussed and decided.

The facts upon which the contention is founded are set forth in the former judgment, and need not be recapitulated here. The substance of counsel's argument may be summarized as below.

1. That though the facts of *Abdul Mojid v. Jew Narain Mehto* (I. L. R., XVI Cal., 233) are practically identical with those of the present case, the principle adopted by the Court that the bar of *res judicata* only applies to the trial of the issue by a Court of first instance, and not to its disposal by the Court of appeal, conflicts with that laid down by the Allahabad Court in *Balkishan v. Kishan Lal* (I. L. R., XI All., 148) which embodies the sounder doctrine, and is supported by the judgment of this Court in *Nur Muhammad v. Jamun*, No. 153, *Punjab Record*, 1890.

2. That it is immaterial whether the plaintiff could or could not appeal from the decree in Rahman Bakhsh's case, as the bar would equally apply in either case.

3. That the principle of *res judicata* should be liberally construed and applied, and that we should be guided by its spirit rather than the words of any judgment, interpreting the provisions of Section 13, Civil Procedure Code.

The authorities cited were almost exclusively those quoted at the original hearing.

I have given the arguments of the learned counsel my best consideration, but am unable to see that there is any such error in our former decision as necessitates a re-consideration of it. As pointed out in that order, the facts of the Allahabad case were very different from those of the present one, which makes the application of the doctrine it lays down to the latter a

matter of difficulty. On the other hand, the facts of the Calcutta case were almost identical, and it cannot be predicated with certainty that the principle enunciated by the Court had no reference to them. The Calcutta case is the only precedent, which can be said to be directly in point, while the Allahabad case is only an indirect authority. When a suit for rent of a particular year is brought, and a decision arrived at, on issues raised by the pleadings of the parties, it is easy to see that in a subsequent suit for rent of a subsequent year between the same parties the findings in the first suit of the last Court of Appeal on the material issues would be binding, and this has been scientifically explained by Mr. Justice Mahmud in *Balkishan v. Kishan Lal*. But where two cross suits relating to the same subject-matter and giving rise to identical issues are tried by the same Court, and it cannot be urged that there is a bar to the trial of the issues by the Court in either case, it is not quite so apparent that the Appellate Court would be precluded from adjudicating on those issues, if one judgment is appealed and the other is not, by the operation of the latter judgment under the rule of *res judicata*, though they may have both given the same findings on the issues.

Moreover, we should hesitate to apply arguments used in another case, which, though expressed in general terms, had possibly a special signification with reference to the facts of that case. I utterly repudiate the argument that the spirit of the rule of *res judicata* is in favour of the petitioners, and that in consequence we should look to that spirit in deciding the objection. The spirit of that rule has absolutely no application to the present case, and had I to decide the objection on general principles only, I should not have the slightest hesitation in rejecting it as wholly unfounded and unsustainable. The petitioners' sole hope lies in bringing their objection within the words of Section 13, Civil Procedure Code, and then in insisting on a *strictly literal* interpretation of them without regard to the consequences. If they succeed in this, we must of course give effect to the plain language of the section, even though it lays down a rule opposed to the true principles of *res judicata*, and therefore not presumably in the contemplation of the Legislature in enacting it.

It is admitted by Sir Whitley Stokes (II, Anglo-Indian Codes, 393) that the question of *res judicata* "is a subject the importance of which * * * is only equalled by the difficulty of dealing with it clearly, concisely and accurately in a

“legislative enactment.” In *Bhola Bhai v. Adhesang* (I. L. R., IX, Bom., 75) Mr. Justice West says: “Section 13 of the Code cannot be applied quite literally, as if it could, the Court trying a second suit would be bound by the decision of a point in a first suit treated by the Court in appeal as irrelevant for that case though not formally set aside. We must construe the section, if possible, so as to avoid an anomalous result * * .” Similar language was used by Mr. Justice Mahmud in *Sita Ram v. Amir Begam* (I. L. R., VIII All., 324) at page 334. He said that the section * * “had given legislative expression to one of those rules of law which are most difficult to formulate for purposes of codification,” and that “in interpreting the language of that section we cannot ignore the fundamental principles of the rule to which that section gives expression, unless indeed the express words of the statute clearly contradict those principles.”

In the case decided by the Allahabad Court, the decision of the material issue as to plaintiff's right to recover *malikana* in the second case, was bound to follow the decision of the same issue in previous suit under the express provisions of Section 13. There would have been no such question raised as was decided by the High Court, had the final decree of Mr. Justice Mahmud been passed in the first suit, before the trial of the issue in the second suit came on. The complications arose only because that decree was given after the decree of the first Court in the second case, and because the decrees of the intermediate Court of appeal were different from those of the first Court in both cases. Mr. Justice Mahmud in a lucid judgment showed that these complications did not affect the operation of the rule of *res judicata*, which would have applied, had the facts been as I have put above. But the important distinction remains that in that case the decision of the first Court would have had to follow the *final* decision in the previous case. Section 13 seems clearly to require, in order to constitute *res judicata*, that there should be a former suit and a final decision in that suit of the point that is subsequently raised. To refer again to the Allahabad case, suppose the decree of the subordinate Judge in the second suit had not been appealed, would the High Court have been bound to dismiss the appeal in the first case, on the ground that the matter was *res judicata* for this reason? I decidedly think not. Yet according to the argument of the reviewers' counsel, based on Mr. Justice Mahmud's reasoning, this would seem to follow.

In the Calcutta case, the decision in neither case was dependent upon the other in the Court of first instance, and I can find no flaw in the Court's reasoning that this state of things was not altered in the Court of Appeal. It is admitted that in the present instance also there was no bar to the trial of the issue regarding plaintiff's right in the Court of the District Judge.

The facts of the present case are stronger in favour of the plaintiff than those of the Calcutta precedent. There the plaintiff-appellant had undoubtedly a right of appeal from the decree passed against him for rent in the other case. But it is doubtful whether the present plaintiff had any right of appeal against the decree in Rahman Bakhsh's suit. I have stated the reasons for my doubt in my former order, and they do not require to be repeated here. There was, I conceive, no decree against the plaintiff, and no relief granted against her within the meaning of Section 206, Civil Procedure Code. She had no property in her hands which she could be, or was, ordered to deliver possession of or to partition, and no declaration was sought against her or granted by the decree. The definition of "decree" in Section 2, Civil Procedure Code, does not appear to militate against this view.

Petitioners' counsel did not attempt to show what the plaintiff's procedure in appeal would have been, but contended that it was immaterial whether she could or could not appeal, and that nevertheless the decision in Rahman Bakhsh's case made the question of her right *res judicata* between her and the reviewers. This contention is, in my opinion, monstrous, and can only be acceded to if it is clearly supported by authority. There does not appear to be any great weight of authority in favour of it. *Niamat Khan v. Phadu Baldia* (1. L. R., VI Calc., 319, F. B.) on which counsel's main reliance is placed, appears to be wrong, and is not supported by the precedents cited in it, and has been frequently dissented from. *Soorjomonee Dayee v. Suddanund Mohapatter* (12 B. L. R., 304, P. C.) which it professes to follow relates to a different point, viz., that where a question has been necessarily decided in effect though not in express terms between the parties, the matter becomes *res judicata* in a subsequent suit between them. Nor is the judgment of the Privy Council in *Krishna Behari Roy v. Banwari Lal Roy* (1. L. R., I Calc., 144) in point. The same remark applies to *Kirpa Ram v. Bhagwan Das*, which was also dissented from, if not overruled by their Lordships in *Krishna Behari Roy's* case. *Sheikh Enayat Ulla v. Sheikh Amir Bakhsh* (25, W. R., 225) related to the binding effect of a decision on a point on

which the case itself, in which it arose, was not decided, and is opposed to the latest decisions of almost all the 'superior Courts in India as well as the Privy Council.

On the other hand, the *ratio decidendi* of the following cases appears to be clearly against the argument that the plaintiff would be bound by the decision of a Court of first instance in which she had no right of appeal. *Bhola Bhai v. Adhesang* (I. L. R., IX Bom., 75) ; No. 20, *Punjab Record*, 1891, and *Brojo Behari Mitter v. Kedar Nath Mozamdar* (I. L. R., XII Calc., 580), though the point actually decided in the first two cases was, while analogous, somewhat different. Mr. Justice West in *Bhola Bhai v. Adhesang* cites the opinion of the eminent German Jurist Savigny in support of the view which he evidently approves that "no matter decided by a lower Court "in which an appeal is excluded can be *res judicata* for any other "case either in the same or in any other Court," which is the rule obtaining in the continental countries of Europe (page 80). See also *Anusuya Bai v. Sakhoram Pandurang* (I. L. R., VII Bom., 464, at 467, 468) ; *Thakur Magan Deo v. Thakur Mahadeo Surj* (I. L. R., XVIII Calc., 647 at 651) supports the same view, and in the absence of clear authority to the contrary, I should be prepared to hold this opinion. In *Krishna Behari Roy's* case the question of adoption contested by the intervenor was appealed and carried up to the High Court in the former suit.

Another principle ruled in *Niamat Khan v. Phadu Baldia* (I. L. R., VI Calc., 319, F. B.) was that when a point is decided but is not necessary for the decision of the suit which is disposed of on another point, the decision on the former point operates as *res judicata* between the parties. This was disapproved by a Full Bench of our Court in *Narain Das v. Faiz Shah* (No. 157, *Punjab Record*, 1889) following the dictum of their Lordships of the Privy Council in *Ran Bahadur Singh v. Luchko Koer* (I. L. R., XI Calc., 311, at page 310), and other precedents cited in the judgment. See also *Ghela Icharam v. Sankal Chand Jethu* (I. L. XV R., III Bom., 597). The Full Bench authority is binding on us, and in my opinion, has a most important bearing on the question before us. For I have always been inclined to take the view that the issue as to the daughter's right to inherit by custom was not a material one in the suit in which Rahman Bakhsh was plaintiff.

The present reviewers were co-defendants with the plaintiff in that suit, but, before the finding on that issue can

operate as *res judicata* between them, it must be clearly shown that it necessarily arose between the reviewers and the then plaintiff, Rahman Bakhsh. Upon a careful analysis, however, of the plaint and pleadings in that suit, this does not appear to have been the case. Rahman Bakhsh's claim was based on two or perhaps three causes of action in the alternative. He wanted partition in accordance with award of the arbitrators appointed by himself and his brothers including the reviewers, all of them having agreed to the award. In so far as this claim was concerned, the daughters of Karim Bakhsh were not necessary parties, as the award could be enforced against all who were parties to the arbitration without reference to the daughters' rights. Their rights could not be set up as a defence by any of those persons in such a suit, and as a matter of fact the petitioners for review never set them up or objected to the claim under the award, except on certain minor points, which are immaterial for purposes of the question we are considering. Subject to the disposal of these points, Rahman Bakhsh could get a decree in accordance with the award on the pleadings of the reviewers, and no issue as to the daughters' rights arose between them on that basis of claim. Rahman Bakhsh, however, impleaded the present plaintiff as a possible heir of his father, and in order to have the partition effected in the presence of all who had any claim to Karim Bakhsh's property, and particularly, I apprehend, with reference to his other causes of action in case the award was held not to be binding. In that case he claimed a fourth share if the daughters of his father were excluded by custom, if not, his proper share under Muhammadan law. There was some movable property not covered by the award, but of value infinitesimally small in comparison with that included in the award, and to this the latter alternatives alone applied. But inasmuch as the daughters had no property whatever in their possession, it was not necessary to implead them, though it was doubtless convenient to do so, and the issue as to their right did not also necessarily arise in those causes of action upon the pleadings of the present petitioners. They, of course, denied the daughters' right, but were willing on that basis to give the plaintiff his one-fourth share, which was also the share given to him by the arbitrators' award. There is no trace in their pleadings of any denial of his right, if the award failed, to such a share, which he was bound to get if the daughters were excluded, as they alleged, by custom. Nor, I apprehend, would they have any objection if plaintiff on

the basis of Muhammadan law was content to take a seventh share in place of one-fourth. They might have denied the daughters' rights on the grounds on which plaintiff reduced his claim, but the Court would not have been bound to frame and decide an issue as to the daughters' rights, as a decree could have been passed in plaintiff's favour for a share less than what he was entitled to on defendants' own showing without going into that question.

The above reasoning appears to me to be correct, considered strictly from the standpoint of *res judicata* with reference to the question decided by the Full Bench in No. 157 of 1889. That the suit of Rahman Bakhsh was a suit for partition of family property is doubtless true, and that in such cases members of the family, who are potentially sharers, are proper parties, may also be conceded. It is certainly convenient and saves trouble, and probably further litigation, if such procedure is adopted, but under the circumstances the suit of Rahman Bakhsh could have clearly proceeded without impleading the present plaintiff, and he could have obtained all the reliefs he claimed without her joinder, subject only to her right to come in and litigate with him regarding her rights whenever she chose.

Even if we assume that she was properly made a party, and that the issue as to her rights was a material one, if Rahman Bakhsh's suit stood by itself, the contention cannot hold when we find that she herself filed a suit in which the question directly and necessarily arose, before the other case was tried. It may possibly be that where the parties upon their pleadings go into a case, and have all the issues tried and decided, they are bound by those findings, where each of them is sufficient to dispose of the case without reference to the logical order in which the issues are necessary, as was ruled in *Piary Mohan Mukerjee v. Ambica Churn Bandopadhyaya* (I. L. R., XXIV Cal., 900). I give no opinion on this question. But where, as in the present instance, the plaintiff has brought her own suit, in which the question of her right directly and necessarily arises, she cannot be held to have acquiesced in the same issue having been treated as a material one in another suit, in which she is only impleaded as a member of the family, the two suits being tried together. Surely the logical order of treatment is to hold the issue as materially and primarily arising in her own suit, and to decide that issue in the other case, if it is considered proper to draw it at all, in accordance

with the decision in her suit. I have tried to show that it is not absolutely necessary in that case. *A fortiori* it is not so when there is a contemporaneous suit by the plaintiff herself.

Lastly, if stress is laid on the necessity of plaintiff's joinder, and of the issue regarding her right in Rahman Bakhsh's suit on the ground that it was a partition suit, and this is conceded to the petitioners, the right view to take would be to regard the two suits as one, as they undoubtedly are in substance, and to hold that a single appeal is sufficient to bring the question of her right properly before the Court of Appeal. Plaintiff's suit is also for partition and possession of her share, and all members of the family are parties to it. Both cases have been heard and tried together. This appears to me to be a sufficient answer by itself to the contention of the reviewers. In fact the contention has all along appeared to me to be an absurd one, without any foundation in law or reason.

I would accordingly overrule it.

As regards the merits of our decision, I do not think any detailed remarks are required. The case has been very fully gone into, and it is not a sufficient ground for re-opening it that the petitioners think we ought to have come to different findings on the questions decided. No obvious or material errors vitiating the findings are shown, and it is too much for them to expect that we should go over the whole ground again, merely because our judgment does not satisfy them. One or two mistakes in appreciating the evidence bearing on one or two of the instances cited as to custom were alleged in the argument, but they are very trivial, even if they are made out, which is not at all clear, and do not affect our findings regarding those instances. As regards the *onus* of proof, we ourselves came to a conclusion with some hesitation, as the matter was one of some difficulty, but all that petitioners now urge was fully borne in mind and considered by us. It is useless to quote decisions under Hindu law about emigrants being presumed to retain their customs and their peculiar law in their new domicile. Hindus ordinarily retain their social and religious customs, their priests and gods and their mode of living, wherever they go, but the same cannot be predicated of Muhammadans. In this case the parties have been found by us to be Arains, but they did not hold land on a tribal tenure as they generally do in Punjab Proper, and the presumption of their following their tribal customs as agriculturists, and of

excluding daughters from succession, have naturally a very feeble application. They founded no village and did not hold land as a village community of Arais. On the contrary, they settled in the suburb of a town, which was long a focus of Islamism, many generations ago among a heterogeneous community of Muhammadans, with whom they intermarried and formed ties of brotherhood, and did their best in the past to conceal their true origin by pretending orthodoxy and trying to make it appear that they were Sheikhs, Koreishi or Sidiqui. Having regard to all these circumstances and to the fact that they have been shown to hold land only for two generations, we found, after giving full weight to all considerations that tell in their favour, that there was no presumption in favour of the custom they allege, and left the question an open one. They had therefore to establish the custom, and we held that they had failed to do so. I am unable to see any impropriety or error in our decision.

No other point in the application for review requires separate notice. Relief has been given to the petitioners in respect of their complaints in their 27th, 28th and 29th grounds by amendment of our decree, under Section 206, Civil Procedure Code.

I would accordingly reject this application.

Application dismissed.

No. 32.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Chatterji.

PIR BAKHSH.—(PLAINTIFF).—APPELLANT.

Versus

KADIR BAKHSH.—(DEFENDANT).—RESPONDENT.

Case No. 565 of 1896.

Lis pendens—Registered and unregistered deeds—Registration Act, 1877, Section 50.

Section 50 of the Registration Act, 1877, gives priority to registered documents of certain specified classes, as regards property comprised therein, over unregistered documents relating to the same property not being decrees or orders, provided, in the latter case, that such decrees or orders are prior in point of date to the registered document.

Where, however, an unregistered mortgage had already brought his suit to enforce his mortgage, *held*, that a mortgage, by registered deed, of the same property made during the litigation must, in accordance

APPELLATE SIDE. }

with the principles of *lis pendens*, be treated as subject to the result of the suit.

Further appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 17th December 1895.

Sham Lal, for appellant.

Sant Ram, for respondent.

The judgment of the Court was as follows:—

CHATTERJI, J.—The material facts of this case are shortly 13th April 1898.
these. On 17th May 1889, Imam-ud-din mortgaged two plots of land measuring 3 *kanals* each at Rajgarh to the defendant Kadir Bakhsh by two deeds, one for Rs. 69, and the other for Rs. 99. Both deeds were unregistered and the mortgages were with possession. Neither deed contains any *khasra* numbers or any specification of the mortgaged lands beyond describing them as *bagh*.

On 23rd November 1891, Kadir Bakhsh sued Imam-ud-din for recovery of the mortgage money with a declaration of lien over the mortgaged property. On 26th November notice was ordered to issue and the case was fixed for the 15th December. On the 16th, the presiding officer of the Court noted that the plaintiff was present but the defendant was not, but as he himself was ill, changed the date of hearing to the 15th January 1892, and directed that the defendant should be informed. The case was again put off to the 11th February, but ultimately came on for hearing on 24th March when, on defendant's confession, a decree was passed in favour of the plaintiff for Rs. 168, with the declaration of lien prayed for in the plaint.

On 9th January 1892, while the above suit was pending, Imam-ud-din sold 27 *kanals* 7 *marlas* of land, comprising various *khasra* Nos. for Rs. 800, to the plaintiff by a registered deed.

Kadir Bakhsh in execution of decree attached his judgment-debtor's land including the 6 *kanals* in dispute in appeal. This led to an objection on the part of the plaintiff and finally to this suit, which is for a declaration that 13 *kanals* of land, *khasra* No. 839, included in his purchase, are not liable to attachment and sale at the instance of the decree-holder. Though Kadir Bakhsh's deeds contain no specification of the land under mortgage, there is now no dispute that the 6 *kanals* are included in plaintiff's deed and form part of the 13 *kanals* for which the present suit is brought.

The plaintiff's deed is registered while Kadir Bakhsh's deeds are not, and there is clearly a competition between these deeds. Under Section 50 of the Registration Act, the plaintiff's deed would have priority on this ground. It is true that Kadir Bakhsh has got a decree, but it was obtained subsequently to plaintiff's sale, and only gives effect to mortgages which, by the above section, must be postponed to it. *Himalaya Bank, Limited, v. Simla Bank, Limited.* (I. L. R., VIII All., 23, F. B.); *Jagrup Rai v. Radhey Singh* (I. L. R., XIII All., 288). On this ground plaintiff appears to have a right to succeed, which both the lower Courts have erroneously failed to see.

There is, however, one defect in the plaintiff's title, which is in our opinion fatal to his claim despite his priority on the ground of registration. It appears from the dates above given that the transfer in his favour was made *pendente lite*, and that in consequence his title is subject to the result of the suit. *Lis pendens* begins when summons has been served on the defendant. Now, though the file containing the summonses has been destroyed, it appears clear to us that defendant was served before the hearing on the 15th December 1891, though he was absent. Had he not been, the wording of the order of adjournment would have been different. It would have been mentioned that the summons had not been served and fresh ones ordered to issue. That the Munsif did not proceed *ex parte* on that date was probably due to his inability to take up the case owing to illness. We, therefore, hold that service had taken place before the 9th of January, and that there was a *litis contestatio* in respect of the 6 *kanals* mortgaged to Kadir Bakhsh when they, in conjunction with other land, were sold to the plaintiff.

The Registration Act, Section 50, gives to registered documents of certain specified classes priority as regards property comprised therein over unregistered documents relating to the same property, not being a decree or order. The words of the section indicate, and it has been ruled, that the decree must be prior in point of date to the registered instrument. *Himalaya Bank, Limited, v. Simla Bank, Limited* (I. L. R., VIII All., 23, F. B.), see also *Jagrup Rai v. Radhey Singh* (I. L. R., XIII All., 288, and No. 125, Punjab Record, 1889). But where as in this case, the unregistered mortgagee has already brought his suit to enforce his mortgage, a transfer by a registered deed during the litigation ought to be treated as

subject to result of the suit. This would be in accordance with the principles of *lis pendens* and there is nothing in Section 50 to take out of the operation of those principles a registered deed executed under the circumstances above stated. In case of *Baij Nath v. Luchman Das* (I. L. R., VII All., 888) a subsequent decree was preferred, though the facts were not quite analogous. The case may be held to have been partially overruled by the Full Bench case reported in the 8th volume of the Allahabad series, but no authority in direct conflict with the principles we have enunciated has been quoted to us, and we think our view is to some extent supported by the reasoning used in the former case. There is nothing opposed to it in *Keshav Pandurang v. Vinayak Hari* (I. L. R., XVIII Bom., 355).

We are accordingly of opinion, though on grounds somewhat different from those adduced by the lower Courts, that the plaintiff is not entitled to priority.

The appeal is dismissed, but, under the peculiar circumstances of the case, we direct that the parties pay their own costs throughout.

Appeal dismissed.

No. 33.

Before Mr. Justice Reid and Mr. Justice Clark.

GANGA SINGH AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

MU SSAMMAT SHIB DEVI,—(PLAINTIFF),—
RESPONDENT.

} APPELLATE SIDE.

Case No. 506 of 1896.

Monthly tenancy—Transfer of Property Act, Section 106—Tenant holding over—Damages.

Where a tenancy of certain shops was not for agricultural or manufacturing purposes, and the tenant failed to prove a contract for a lease from year to year, *held*, on the principle laid down in Section 106 of the Transfer of Property Act, that the tenancy was monthly, and that a notice of 15 days, terminating with a month of the tenancy, was valid.

Held, further, that the damages awardable by the Court against a monthly tenant who wilfully and contumaciously holds over, after notice, should be reasonable in amount.

Further appeal from the order of J. G. M. Rennie, Esquire, Divisional Judge, Rawalpindi Division, dated 8th February 1896.

Ishwar Das, for appellants.

Duni Chand, for respondent.

The following judgment was delivered by

25th April 1898.

REID, J. — We are satisfied that the tenancy of the shops in respect of which this suit was filed, was monthly, and that the notice of 15 days, terminating with a month of the tenancy, was valid. The fact that the shops had been let to a liquor contractor, who had a yearly contract for the sale of liquor, does not affect the landlord. The tenancy was not for agricultural or manufacturing purposes, and the rule contained in Section 106 of the Transfer of Property Act is applicable, the tenant having failed to prove a contract for a lease from year to year. The question remains what damages in lieu of rent the landlord is entitled to, for the period during which the tenant held over, after expiry of notice.

In England this question has been settled by Statute 4, George II, cap. 28, Section 1, providing that the tenant shall pay double the yearly value of the premises.

The pleader for the appellants relies on *Kylash Chunder Sircar v. Woomanund Roy* (XXIV W. R., 412), and *Budan Mollah v. K. N. Chatterjee* (Ib. 441) for the proposition that reasonable damages for the holding over should be fixed by the Court and *Tejendro Narain Singh v. Bakai Singh* (I. L. R., XXII Calc. 658) is in his favour.

Counsel for the respondent contends that, if Rs. 1,000 *per mensem* had been specified in the notice as the rent payable, if the tenant held over, the whole would be recoverable, and relies on an unreported ruling of this Court, Civil Appeal 195 of 1897.

In that case the occupant was mortgagee, paying no rent. The purchaser of the equity of redemption paid off the mortgagee and gave him notice that, if he held over after a certain date, Rs. 30 *per mensem* would be payable.

The learned Chief Judge held that, after expiry of reasonable notice, the mortgagee "must pay what plaintiff distinctly told him would be the end, if he continued to occupy the shop, viz. Rs. 30 *per mensem*."

The rent fixed for the shops in suit was originally Rs. 7-8 and it appears that the respondent was willing to accept Rs. 15, after issuing notice, but that the appellants declined to pay so much.

Under the English Statute it has been ruled that the penalty is recoverable only in case of a wilful and contumacious holding over, after notice, and not on a holding over under a *bonâ fide* claim of title or right, though erroneous.

We are satisfied that the holding over in the case before us was wilful and contumacious.

In the case before the learned Chief Judge it appears that the plaintiff paid Rs. 15 *per mensem* for a similar shop, the rent charged being therefore double the ordinary rent. It was unnecessary to consider whether rent, several times that ordinarily paid, would be recoverable, if charged in the notice to quit.

The rule laid down in the *Weekly Reporter* cases is equitable, and, applying that rule, we hold that the English Statute is a fair guide to the damages to be assessed in the case before us.

We modify the decree of the Court below, reducing the decree for the months of June and July, from Rs. 60 to Rs. 30. In other respects the decree of the lower Appellate Court will stand. The parties will pay their own costs of this appeal.

Decree modified.

No. 34.

Before Mr. Justice Reid and Mr. Justice Clark.

H. H. RAJA OF FARIDKOTE,—(PLAINTIFFS),—
APPELLANT,

Versus

SARDAR GURDYAL SINGH,—(DEFENDANT),—
RESPONDENT.

} APPELLATE SIDE.

Case No. 362 of 1896.

Limitation Act, 1877, Sections 10, 14—"Vested in trust"—Suit for recovery of money misappropriated by Khazanchi of Native State—"Defect of jurisdiction or other like cause"—Suit based on void judgment of foreign Court.

Section 10 of the Limitation Act, 1877, has a limited application, and does not cover a suit brought against the *khazanchi* of a Native State to recover money said to have been misappropriated by him from the money in his charge, such money not being "vested in trust for any specific purpose," within the meaning of the said section.

Neglect or laches of the plaintiff either in stating his case or prosecuting his suit is not "a defect of jurisdiction or other cause of a like nature," within the meaning of Section 14 of the said Act, and the inability of the Court to entertain the suit must arise from either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself, and unconnected with the acts of the parties.

Where, therefore, a plaintiff sued in a Court of competent jurisdiction, but based his suit on a foreign judgment which was a mere nullity, *held*,

that he was not entitled to any deduction of time, under Section 14 of the Act, by reason of such suit.

First appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 27th January 1896.

W. H. Rattigan, Q. C., and Muhammad Shah Din, for appellant.

K. P. Roy and Ishwar Das, for respondents.

The judgment of the Court was delivered by

18th April 1898. CLARK, J.—The facts of this case may be briefly stated. Sardar Bir Singh, father of defendant, was *bakhshi* of the Faridkote State, from 1869 to about April 1874, he then left the Faridkote State, and went to live in the Jind State.

On 14th April 1877, the Faridkote State filed two suits against Sardar Bir Singh in the Faridkote Courts and obtained *ex-parte* decrees on 8th November 1879 for Rs. 67,282, and on 25th January 1880 for Rs. 18,044.

On the former foreign decree the Faridkote State on 10th November 1881 filed a suit in the Court of Mr. Parker, Judicial Assistant Commissioner, Lahore, for Rs. 67,282. The suit was dismissed on 24th February 1882, on the ground, *inter alia*, that the Faridkote Court had no jurisdiction to pass the decree. Plaintiff's appeal to the Additional Commissioner was dismissed on 29th August 1882, his appeal to the Chief Court was accepted on 24th July 1888 and the claim decreed. (*Punjab Record*, No. 191 of 1888). On appeal to the Privy Council on 28th July 1894, the decree of the Chief Court was reversed, and the decree of the lower Court restored (*Punjab Record*, No. 112 of 1894). The present suit was then filed on 16th March 1895 on the original cause of action.

The Divisional Judge, Lahore, has dismissed the suit as barred by limitation, he held that Sardar Bir Singh held the position of Prime Minister of the State, that there was no evidence to show that he ever personally took over charge of the treasury or treasure, that he exercised a general control and supervision with his other numerous duties over the treasury offices and the treasurer, that he was not a trustee, and that Section 10 of the Limitation Act did not apply, that the suit was governed by Articles 90 and 91 of Act IX of 1871, and was barred.

Plaintiff appeals to this Court, and the first question raised is whether Section 10 of the Limitation Act (Act XV of 1877) applies.

To determine this it became necessary to consider Sardar Bir Singh's position in the State with reference to the treasury.

The question then arose whether plaintiff could rely on the evidence given in the Faridkote Court.

We hold that the consent of counsel to accept the previous record in this case so far as it was relevant to the present case (page 4, paper book) must be construed strictly, and only to refer to such evidence as was relevant and admissible.

We held that the statements of deceased witnesses recorded in the Faridkote Court were not admissible, as that Court was without jurisdiction and the statements were made *coram non judice*.

We now proceed to consider the position of Sardar Bir Singh, as it appears from the evidence on the file. We note that the witnesses are subjects of the Faridkote State, and that their evidence must be accepted with reserve, where it is against defendant.

We think it is clearly established that Sardar Bir Singh was the Raja's right-hand man and certainly not exclusively in charge of the treasury.

It is argued that he kept one of the keys of the treasury and either himself or by one of his personal subordinates wrote up the accounts.

The most important witness is Dula Mal, he was one of the two treasurers in charge of the treasury from 1869 to 1874, the Faridkote decree was also against him, he admits having joined with Sardar Bir Singh and others in misappropriating Rs. 21,000 from the treasury, he was imprisoned, but Sardar Bir Singh continued in office, and was not held responsible.

This witness therefore is not a credible one against defendant. It is he who says that Sardar Bir Singh had one of the keys of the treasury, and that he kept an account book of the treasury accounts.

He says daily balances were struck and money counted for about eight months, after that no balances were struck; he says Sardar Bir Singh's predecessor Bakhshullah Khan kept no accounts. When the *bakshi* sent for money without a voucher one of his orderlies used to come. The Raja's orders for money all came through *Bakhshi* Bir Singh. Occasionally he gave orders himself to pay small sums of Rs. 10 or Rs. 20.

It is evident then that the treasury business was managed in a most primitive fashion. Great reliance is placed on the book in Bir Singh's own handwriting, which, it is alleged, shows and works out a balance of Rs. 82,260 on 1st *Magh*, *Sambat* 1927, and which balance is alleged to have been tampered with and altered to Rs. 302 to correspond with the money in the treasury. We do not feel satisfied that this is the official treasury book kept up in the regular way of business. It may have been an incomplete record kept up by Bir Singh for his own information, and may not have been fully written up.

We are not satisfied that only Bir Singh's orders on the treasury were honoured. The Raja or the Tikkaji may have been able to give orders on the treasury.

Dula Mal and Maula may have been able to misappropriate money without the knowledge and connivance of Bir Singh, as they apparently did on one occasion.

We do not think it is shown that the treasury money was in Bir Singh's custody to such an unreserved extent that he can be considered a trustee of the money.

Just as the Raja himself by inattention to business was liable to have defalcations in his treasury, so was Bir Singh, and it is not necessary that he must have been a party to such defalcation.

However, supposing that his service in the State involved the receipt and custody of moneys of the State to be accounted for by him to the State, and that he did misappropriate portion of such moneys, is a suit to recover such moneys within Section 10, Act XV of 1877.

We note here that the letter of 8th April 1877 from the Faridkote State to Bir Singh, the first letter we have on the file, though there appear to have been previous letters, says that there is a difference of Rs. 61,684 in the treasury books, to the expenditure of which the papers furnish no clue, and asks Bir Singh to settle up the account, and the original action was brought to recover moneys alleged not to have been duly accounted for, and to have been misappropriated. Dula Mal and Maula were sued along with Bir Singh, and the Court was asked to award the amount from any of them who may be proved to be liable.

Section 10, Act XV, 1877, says: "No suit against a person "in whom property has become vested in trust for any specific "purpose, or against his legal representatives or assigns (not "being assigns for valuable consideration) for the purpose of

“following in his or their hands such property, shall be barred
“by any length of time.”

Starling in his work on the Indian Limitation Act under this section points out:—

Two circumstances must concur to bring this section into operation—1, property must have vested in some person as a trustee for a specific purpose; 2, the suit must be brought to follow the trust property.

Vesting implies that some one has an estate in the subject-matter of the alleged trust, not merely that he has power to charge it or direct how it should be disposed of (*Dickenson v. Teasdale*, 1 De G. J. and S. 52, *Coverdale v. Charlton* 42, Q. B. D., 120), consequently Directors of a Company are not persons in whom the property of the Company vests under this Section (*I. L. R.*, XVIII Bom., 119), nor is a liquidator of a Company. The particular words in this section “in whom property has become vested in trust for a specific purpose” render inapplicable many of the English decisions as to Directors and others being express trustees of money over which they have control.

The cases relied upon by plaintiff are—(1) *Burdick v. Garrick*, L. R., V Chancery Appeals, 233.

The head note runs—

“An agent who stands in a fiduciary relation to his principal cannot set up the Statute of Limitations in bar of a suit for an account by his principal.

“An agent, who was a solicitor in London, held a power-of-attorney from his principal in America, to sell his property and invest the proceeds in his name. The agent received certain moneys under the power and paid them into his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1868 she filed a bill against the agent for an account.

“Held, that the agent held the money in trust for his principal, and therefore the Statute of Limitation was no bar to the suit.”

The money was held by the solicitor there on quite a different footing from that on which Bir Singh held the money.

Reliance is specially placed on the remarks of Lord Hatherley, on pages 238—240, and of Sir G. M. Giffard, on page 243, but we think that the remarks must be referred back to

the facts of the particular cases in order to properly understand them, and that this case is not a good authority for giving plaintiff the benefit of Section 10.

(2). *I. L. R., IV All.*, 189.—This case seems against plaintiff. Section 10 was held not to apply, as it had reference to express trustees, and that it must be shown that the rightful owner has entrusted the property to the person alleged to be a trustee for the discharge of a particular obligation.

(3). *Law Reports*, 34, *Chancery Division*, 462.—This was a case between solicitor and client, and on facts entirely dissimilar to those of the present case.

(4). 1, *Bengal Law Reports*, 11 *short cases*.—This was a case of master and servant, sums had been advanced to the servant for building purposes, and it was held "that the matter partook of the nature of a trust to which no limitation will apply." The judgment is only a few lines and the facts are not fully stated.

(5). *I. L. R., II All.*, 361.—Starling on pages 49 and 51, Limitation Act, 3rd Edition, refers to this case, he says: "In order, therefore, in this country to bring a case under this section there must be evidence that a trust has been created for some specific purpose, and that property has become vested in a trustee for the purpose of carrying that purpose into effect."

"There is only one case in which any of the Courts in India have acted on a different principle, and that was what 'is called a hard case,' he then refers to this case, *II All.*, 361, and says, the Allahabad Court has, subsequently not approving of this case, agreed in principle with all the others (*I. L. R., V All.*, 608).

(6). *I. L. R., XI Mad.*, 274.—This is the most favourable case quoted for plaintiff. The *dharamkarta* of a temple, who has charge of the funds of the temple for the purpose of applying them to temple purposes, is a person in whom funds have become vested for a specific purpose, and any portion of such funds which have come into his hands and been misappropriated by him may be followed without limit as to time.

However, the position of a *khazanchi* both with reference to his application of and to the vesting of the funds in his charge is different from that of a *dharamkarta*.

(7). *I. L. R., XVII Calc.*, 621.—"One T.C., in anticipation of death handed over his property to the defendant, his brother,

“and verbally directed him to pay certain specified debts and to apply the surplus for the necessities and support of his family. Held, that a good trust was created at any rate so far as the debts were concerned.”

The facts here are so different that we fail to see how the case gives any support to plaintiff's contention.

(8). *L. R., Q.B.*, 1893, page 390.—A trust fund was entrusted by the trustees to a *solicitor employed by them as solicitor to the trust*, held that he must be considered as having been in the position of an express trustee of such money, and therefore the lapse of time did not act as a bar to an action against him for the money.

We are referred to the *dicta* of Lords Esher and Bowen, on pages 394 and 397. We think it is right for us to consider these *dicta* along with facts of the case then before the learned Judges.

Those facts are so different from the facts of the present case that they render that case of no use to us as a guide.

For defendant the following cases have been quoted :—

(1). *I. L. R., IV Calc.*, 455, where it was held that the language of Section 10 is specially framed so as to exclude implied trusts or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations.

Mr. J. Markby on page 469 says: “The relation between the defendant and the heirs was undoubtedly a fiduciary one, and therefore in a very general sense of the word defendant might be called a trustee. I do not think the 10th Section of the Act was intended to comprise all fiduciary relations whatsoever. The position of agents, factors and managers, and *benamidars* may be, and generally is, a fiduciary one, but agents and factors are specially provided for in other parts of the Act, and *benamidars* are expressly declared not to be trustees.”

(2). *I. L. R., IV Calc.*, 897, where it was held that the words “in trust for a specific purpose” are intended to apply to trust created for some defined or particular purpose or object as distinguished from trusts of a general nature, such as the law impresses on executors and others who hold recognized fiduciary positions.

(3). *I. L. R., V Calc.*, 910; *IV All.* 187; *XV Calc.* 161; *XX Calc.*, 51; *VIII Calc.*, 788; *X I. A.*, 90; and *Punjab Record* No. 84 of 1891.

The learned counsel for plaintiff in construing Section 10 would hold that the word "vested" means only "held in possession" (*I. L. R.*, IV Cal., 468) that the words "in trust for a specific purpose" would cover any case where money was held for the benefit of the creator of the trust, that in this case it was sufficient that the money was held for the benefit of the Faridkote State, that the words "for the purpose of following such property" in the case of cash give the right to sue for money without reference to the particular property (*L. R.*, X I. A., 96).

The effect of such construction would be that any person who entrusted money to another for his own uses, could, after the lapse of any time, bring a money suit against him or his representative.

This would, in our opinion, be opposed to the principles on which the law of limitation is based. It would render a large number of the Articles of Schedule II of the Limitation Act meaningless (*e. g.*, Articles 60, 62, 89, 90, 98, 100, 105, 133, 134, 145) as under the section so construed suits under these articles would not be barred by any length of time.

In our opinion Section 10 has a limited application, and does not cover a suit brought against a *khazanchi* to recover money said to have been misappropriated by him from the money in his charge. Such money was not "vested in trust for any specific purpose" with the *khazanchi*. We therefore hold that Section 10 of the Limitation Act does not apply to this case.

The next question is whether plaintiff's claim is within limitation by reason of any deductions to which he is entitled.

The first deduction claimed is under Section 13 on the ground that Sardar Bir Singh was absent from British India till the date of his death, the 2nd September 1887. We are disposed to think that plaintiff is entitled to this deduction, and as we hold that even with this deduction the claim is barred, we proceed on the assumption that plaintiff is entitled to deduct the period up to 2nd September 1887.

It was at first argued that the period of limitation applicable to the suit was six years under Article 120, and that plaintiff was entitled to deduct the period during which he was suing in the Faridkote Court, from 14th April 1877 to 8th November 1879, and add it on to the 2nd September 1887. The argument was obviously unsustainable, as the period 14th April 1877 to 8th November 1879 has already been allowed in the deduction up to the 2nd September 1887, and cannot be allowed twice over. The argument was not pressed.

It becomes unnecessary therefore to determine under which article the suit falls ; if it does not fall under some special article it falls under Article 120, and whether the limitation is three years or six years is immaterial, as both periods stand on the same footing.

This suit was instituted on 16th March 1895, and allowing plaintiff the most favourable article, it should have been instituted on 2nd September 1893, unless he is entitled to some deduction.

Plaintiff under Section 14 claims to deduct the whole period from 10th November 1881 to 28th July 1894, during which the case was pending in British Courts up to the decision of the Privy Council.

Passing over objections taken by defendant that the present defendant only came on to the record in 1887, and that the cause of action is not the same in the two suits, we proceed to consider the words, " in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain " the previous civil proceeding, for the meaning of these words will be sufficient for the disposal of the claim to this deduction.

Obviously the British Courts had jurisdiction to try the suit, there was no " defect of jurisdiction." Plaintiff elected to sue or made a mistake of law and sued on a foreign judgment instead of on his original cause of action. The foreign judgment was a mere nullity, and the document on which plaintiff relied was useless, and so his suit was dismissed.

The case would not have been different if plaintiff had been suing on an instrument, and his suit had been dismissed for defect of stamp or registration of the instrument. Can it be said that it was from a " cause of like nature " to defect of jurisdiction that the Court was unable to entertain the suit ?

For plaintiff it is urged that the dismissal of the suit by the Lahore Court, because the Faridkote Court had no jurisdiction, is of a like nature to the Lahore Court itself having no jurisdiction.

Plaintiff relies upon the following authorities :—

I. L. R., X Cal., 86 ; *XIII Mad.*, 451 ; and *Punjab Record*, 59 of 1884.

Defendant relies upon the following authorities :—

I. L. R., X All., 587 ; *XII All.*, 207 ; *II All.*, 622 *W. R.*, 1864, 371 ; *Punjab Record*, No. 19 of 1888 and No. 45 of 1893.

We have considered these authorities, we agree with what is said in 6 *W. R.*, 184, that any neglect or laches of the plaintiff in either stating his case or prosecuting his suit is not a defect of jurisdiction or other cause of a like nature. The inability of the Court to entertain the suit must arise from either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself and unconnected with the acts of the parties.

We do not think that plaintiff's suing in a Court of competent jurisdiction by mistake on a foreign judgment, which was a mere nullity, can be held to be a cause of like nature to a defect of jurisdiction in the Court to entertain the suit.

In the end of his address counsel for plaintiff quoted *I. L. R.*, XIX All., 348, but in that case the ruling was that Section 14 applied to a case where a plaintiff has been prosecuting his suit in a wrong Court in consequence of a *bonâ fide* mistake of law.

The case is inapplicable as plaintiff was not here prosecuting his case in a wrong Court.

We hold therefore that plaintiff is not entitled to deduct the period spent by him in suing in the British Courts, and that the suit is barred by limitation. We dismiss the appeal with costs.

Appeal dismissed.

No. 35.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

AHMAD ALI SHAH,—(PLAINTIFF),—APPELLANT.

Versus

AMIR SHAH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 1018 of 1895.

APPELLATE SIDE. }

Res judicata—Omission by guardian ad litem of minor to appeal against decree—Gross negligence on part of guardian—Effect of such decree.

Where in a previous suit a decree was passed against the present plaintiff, who at the time was a minor, and was duly represented by his mother as his guardian *ad litem*, held, that the omission by the latter to appeal on his behalf from such decree, notwithstanding that there were excellent grounds, both on law and in the facts, for an appeal, amounted to gross negligence on her part, and that under such circumstances it would be contrary to law and equity to hold the plaintiff bound by the former decree.

The position of a guardian *ad litem* of a minor being that of a trustee, he is bound strictly to act in the interests of the minor, and he has not the liberty, as long as he retains his position, of abandoning the case as he would have were it his own, unless such abandonment is clearly in the interests of the minor. Every case must be judged by its own facts, and for the purpose of finding out whether such guardian was guilty of laches or fraud in previous proceedings, the Court has power to go into them and to form its own conclusions regarding them.

Further appeal from the order of Captain G. S. Martindale, Divisional Judge, Mooltan Division, dated 17th June 1895.

Herbert, for appellant.

Fazl Din, for respondents.

The facts of the case sufficiently appear from the judgment of the Court delivered by

CHATTERJI, J. —The facts of this case are sufficiently given 3rd June 1898.
in the judgment of the first Court. The suit has been dismissed on the ground that in the previous case plaintiff represented by his mother as his guardian *ad litem* was sued for possession of this land along with his uncle and a decree was passed against him for possession, and that the claim is *res judicata*, there having been an issue as to the plaintiff being bound by the act of his uncle, Amir Shah, which was decided against him.

In that suit the uncle refused to defend it on plaintiff's behalf on which his mother was appointed his guardian *ad litem*. The minor was thus properly represented and the guardian's defence took the same line as is now taken by the plaintiff. An issue was framed as to her contention, but in a general form which was decided adversely to the minor on the ground that the mortgage by the uncle was binding as it was for the benefit of the joint family. No decision was given on the specific point which was the gist of the contention, *viz.*, that the uncle had no authority "to mortgage his share without obtaining legal permission." The Court ignored the provisions of the Muhammadan law as to the powers of guardians over immovable property belonging to their wards, and held that the uncle as the *de facto* guardian was competent to effect the mortgage for the benefit of the joint family. Long before the date of decision, however, the rule of Muhammadan law obtaining in this Province had been declared by this Court in No. 144, *Punjab Record*, 1883. The mother did not appeal and the decree became final.

The evidence taken in that case did not even prove the ground on which the plaintiff was held bound. It related

almost exclusively to the execution of the mortgage deed, the payment of consideration and the previous possession of the mortgagee under the deed. It would thus seem clear that the plaintiff's guardian had excellent grounds for contesting the decree of the first Court both on the point of law as regards the uncle's authority and on the question of fact as to whether the transaction was for the benefit of the minor.

The question, however, is, can we go into these points in order to see whether the former decree is to have the force of *res judicata* or not? Ordinarily we should not be competent to do so, but if the guardian of the plaintiff was guilty of gross negligence in conducting proceedings on his behalf in the previous litigation the decree would not be binding on him, and we are enabled to go into these questions in order to see whether the guardian has been so guilty or not.

In *Lala Sheo Churn Lal v. Ram Nandan Dobey* (I. L. R., XXII Cal., 8) where the next friend of a minor plaintiff had failed to attend at a hearing, and the case was dismissed in default, it was held that she had acted with gross negligence, though she subsequently unsuccessfully tried to have the order set aside in the same Court and in the Court of Appeal, and that the order of dismissal did not preclude a fresh suit by the ward on his attaining majority. The English practice is the same. See Simpson on *Infants*, 2nd Edition, page 512, and in *re Hoghton* (L. R., XVIII, Eq., 573).

Here the default committed by the guardian was her omission to appeal. She had an excellent case both on law and on the facts and her failure to contest the first Court's decision amounted to gross neglect. We do not mean to say that the duty of defending a suit or of lodging an appeal from an adverse decision is always incumbent on the guardian and that he has no freedom of judgment to decide whether such proceedings should be taken on behalf of the minor or not, or that he is necessarily bound to carry on a litigation when the issue is patently hopeless. The remarks of their Lordships of the Privy Council in *Lekraj Roy v. Mahtab Chand* (XIV M. I. A., page 399) should be borne in mind in this connection. The duty of a guardian for the suit or of a next friend is thus summed up by Mr. Justice Trevelyan in his work on the law relating to minors. He should "do all that in him lies to "further the interests of the minor, and he should be at least as "active in guarding and promoting the interests of the minor "as he would be expected to be if his own interests were

involved," 2nd Edition, page 280. It may be added that his position being that of a trustee he is bound strictly to act in the interests of the minor, and he has not the liberty, as long as he retains his position, of abandoning the case as he would have if it were his own, unless such abandonment is clearly in the interests of the minor. He must act in good faith, that is with due care and caution, and want of knowledge when information was available on inquiry would amount to gross negligence and to constructive fraud. *Bibi Solomon v. Abdul Aziz* (I. L. R., VI Cal., 687). Every case must be judged by its own facts and for the purpose of finding out whether the guardian was guilty of laches or fraud in the previous proceedings, the Court has power to go into them and to form its own conclusions regarding them.

We have shown above that there was not the shadow of a reason for the guardian of the minor for not contesting the Court's decision. She was a woman ignorant and probably incapable of forming a proper judgment, but she was the trustee for the minor and the latter cannot be made to suffer for her laches and negligence to whatever cause they may be due. The probability is that she was induced to forego further proceedings.

On the whole, we are of opinion with reference to the facts of this case that it would be contrary to law and equity to hold the plaintiff bound by the former decree. The case must, therefore, be gone into on the merits and all the other contentions of the parties heard and decided. If the plaintiff is held entitled to succeed, and it is found that he has derived some benefit under the mortgage transaction he should only get a decree subject to his restoring such benefit.

We accept the appeal and reversing the decrees of the lower Courts return the case to the Court of first instance, for a fresh decision with reference to the above remarks. Court-fee on the petition of appeal to be refunded. Other costs to abide the event.

Appeal allowed.

No. 36.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

APPELLATE SIDE. { CHUNDER BHAN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,
Versus
AHMAD YAR KHAN AND OTHERS,—(DEFENDANTS),—
RESPONDENT.

Case No. 1232 of 1895.

Alluvion and diluvion—Title to land acquired by accretion—Land subsequently re-transferred by avulsion—Identification of sites.

Owing to changes in the course of the river Chenab, certain land, which was identified as having originally belonged to plaintiffs, after being submerged, gradually re-appeared on the Muzaffargarh side as the river receded, but was subsequently bodily transferred to the Mooltan side by a sudden change in the course of the river. While the land was on the Muzaffargarh side, the defendants brought a few detached plots under cultivation, and were still cultivating them at the time of suit. The burden of suing for possession of the said land was in consequence upon plaintiffs. The latter instituted a suit and obtained a decree in the first Court, which was, however, reversed on appeal by the Divisional Judge.

Held, in accordance with the principle laid down in *Lopez' case* (5 B. L. R., 521), that inasmuch as the site of the land in question had been duly identified as plaintiffs', the latter were entitled to succeed, and that the mere facts that they did not follow the land when it went to the Muzaffargarh side, and that the defendants had brought a few scattered plots thereof under cultivation, did not affect plaintiffs' rights as owners of the site.

I. L. R., XIX *All.*, 238, not followed.

Further appeal from the order of Captain C. S. Martindale, Divisional Judge, Mooltan Division, dated 17th August 1895.

K. P. Roy, for appellants.

Lal Chand, for respondents.

The facts of the case are fully set forth in the judgment of the Court which was delivered by

9th May 1898.

GORDON WALKER, J.—The plaintiffs in these five appeals (1232—36) are individual proprietors—of *mauza* Dhuddi in the Mooltan District and the defendants are the owners of *mauza* Pakka Sandila in Muzaffargarh District. The cases are of the usual type relating to land subject to the action of the river (Chenab) which is claimed by both parties to the suits.

The history of the case appears to be as follows. Plaintiffs' village (Dhuddi) was originally an area detached from a village of the same name on the Muzaffargarh side of the river.

The Settlement Record shows that the separation took place about 1858. In 1863 there was some dispute about the partition of the area amongst the proprietors, and from those proceedings it appears that 1,349 *bighas* (5,397 *kanals*) had been detached from the original village, this area being apparently formed into a separate estate on the Mooltan side of the river. The real starting point in the case, however, is the settlement survey effected in 1874. In that year boundary (*thakbast*) and field maps were prepared. *Mauza* Dhuddi is shown in them as bounded on the north by *Nun* (?), on the east by *jhok* Lachmi Narain, on the south by Akbarpur, and on the west by the river. During the course of settlement operations the village lands were encroached on by the river, and when the assessment was actually made in 1880, only 135 $\frac{3}{4}$ *bighas* (543 *kanals*) were left. Erosion or submersion went on till in 1887 (*Sambat* 1943) the whole of the lands of the village had disappeared.

In 1890-91 the river suddenly altered its course towards the Muzaffargarh side, and it was then found (Tahsildar's report dated 25th May 1891, which started the revenue proceedings leading up to these civil suits) that there was a considerable area in dispute between the plaintiffs, owners of *mauza* Dhuddi, and the defendants of Pakka Sandila. The latter alleged that the land had come as an accretion to their village, and that they had taken possession and were still in possession of it, and that as it had been transferred to the Mooltan side by avulsion they were entitled to retain it. The dispute, so far as the Revenue authorities were concerned was decided by the Collector's (Mr. Meredith's) order, dated 30th March 1893, which was passed after a protracted inquiry. That order was supported on appeal to the Commissioner.

The map in the file of those proceedings has been referred to throughout the arguments before us, and may now be referred to. The area in dispute was that indicated by the letters *D K I G*. The Collector found (and this has nowhere been questioned) that the area had been recovered from the river in three lots :—

<i>D B E F G</i>	in <i>Sambat</i> 1933	(1877-78) ;
<i>F K J H F</i>	in <i>Sambat</i> 1942-43	(1886-87) ;
<i>J H I</i>	in <i>Sambat</i> 1945-46	(1889-90).

Making a slight adjustment of the boundary between the first two of these plots, the Collector awarded to the village of Pakka Sandila the plot marked in the map *D B C G*, thus restoring the settlement boundary of *mauza* Dhuddi to the line *A B C*.

All to the east of that line he allotted to *mauza* Dhuddi, and that is the area which is now in dispute. The effect of the Collector's order was to restore the boundaries of *mauza* Dhuddi according to the settlement survey of 1874 already referred to.

The area in dispute certainly went to the Muzaffargarh side of the river by accretion and has come back by avulsion, these terms being used in their ordinarily accepted sense. In other words the land, after being submerged, gradually reappeared on the Muzaffargarh side as the river receded, and was then bodily transferred to the Mooltan side by a sudden change in the course of the river. At the same time it may be noted that the "accretion" took place apparently in *two* seasons, the land being recovered in two large plots. While the land was on the Muzaffargarh side the defendants brought a few detached plots under cultivation, and these they still cultivate. Although by the Collector's decision the land in dispute was included in the village boundaries of Dhuddi, the defendants, owners of Pakka Sandila, remained in at least partial possession, so that plaintiffs had to sue. They obtained a decree in the first Court, but on appeal to the Divisional Judge their suit was dismissed.

As regards the question of limitation, which may be dealt with first, defendants cannot allege possession (except in respect of the small triangular piece of land marked *B E L*) prior to *Sambat* 1942-43. Before that, as the land was submerged, it was incapable of being physically possessed, so that the fact of plaintiffs being out of possession cannot tell against them. The plaintiffs certainly did not "of their own act cease to possess" (*Punjab Record*, No. 6 of 1896).

Next as to the rule of decision to be applied to the case. The *Riwaj-i-am* gives the custom applicable to these two villages as that of "*len den*." The question of custom is not however really material. Defendants base their claim to retain the land on the facts that when it appeared on the Muzaffargarh side they took possession of it as proprietors, and that it has been transferred to the Mooltan side of the river in a clearly recognizable form by "avulsion," their possession remaining undisturbed. The Divisional Judge has admitted their claim on these grounds and has referred in support of his view to an unpublished decision of this Court (No. 321 of 1893) to which reference has also been made before us. That was a case between villages of Pakka Sandila (defendants in this case) and Akbarpur which adjoins Dhuddi on the south. The full facts

with regard to the land there in dispute do not appear from the judgment, but it may be noted that it had "according to the general rule admitted by both parties become the *owner-ship* of defendants by gradual river action." That in itself would be enough to distinguish the two cases. It may be also noted that the recorded custom between the two villages of Akbarpur and Pakka Sandila is different from that recorded as in force between the parties' villages. The former two villages made an exception from the generally accepted custom of *len den*, and intimated their intention to adhere as between themselves to that of the *deep stream*.

The rule to be applied to the circumstances of the present dispute appears to us very clearly to be that laid down by the Privy Council in the well known *Lopez case* (5 B. L. R., page 521). That is the rule which has been followed by this Court in such cases. There can be no question whatever as to the identification of the *site* of the land in dispute as plaintiffs' according to the settlement maps, and the Collector's decision has merely restored the boundaries of their village to what they were when the settlement survey was made. The boundaries of plaintiffs' village on the three sides away from the river are clearly defined by those of adjoining villages, and what the defendants' claim is to come in between Dhuddi and Akbarpur, pushing their boundary right up to that of *jhok* Lachmi Narain and completely separating the two former villages. The case is a very apt illustration of the injustice that would result from the acceptance of any principle other than that laid down in *Lopez case*. It is quite immaterial that plaintiffs did not follow the land when it went to the Muzaffargarh side, and that defendants did in fact bring a few scattered plots under cultivation. That cannot in any way affect the rights of plaintiffs as owners of the site. We have been referred to a recent ruling of the Allahabad High Court (XIX, page 238), and that would certainly seem to be in favour of defendants' contention. But we are not prepared to accept the distinction which seems to be there drawn between *Lopez case* and one like the present.

It is only necessary to notice two minor points. The plaintiffs in each of these five cases have proved that the land was their property. They have in fact sued according to the old map. Then as to the small triangular plot *BE L*. It does not appear that plaintiffs have lost their rights in this any

more than in the rest of the land in dispute, or that defendants have been in effective possession of it.

The appeal in this case is accepted and the order of the first Court restored, plaintiffs being given a decree for the land in suit with costs throughout.

Appeal allowed.

No. 37.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

APPELLATE SIDE. {

MUSSAMMAT EMNA AND ANOTHER,—(DEFENDANTS),
APPELLANTS.

Versus

SAJAWAL KHAN AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 76 of 1896.

Custom—Succession—Respective rights of daughters and collaterals—Sabzani Lund Bilochis, Dera Ghazi Khan District—Riwaj-i-am.

Found, that defendants had failed to prove that, by custom among Sabzani Lund Bilochis of Dera Ghazi Khan District, daughters are entitled to succeed in preference to collaterals.

In such cases the mere fact that the daughter has married in the tribe and is in actual possession of the land gives her no right of succession superior to that of the collaterals.

Further appeal from the order of R. L. Harris, Esquire, Divisional Judge, Derajat Division, dated 31st October 1895.

Muhammad Shah Din, for appellants.

Shelverton, for respondents.

The judgment of the Court was delivered by

13th May 1898.

GORDON WALKER, J.—The parties to the suit are Sabzani Lund Bilochis of the Dera Ghazi Khan District. A pedigree table is given in the judgment of the District Judge. The dispute is about the succession to the landed property of *Sanjar*, defendant, his daughter, being in possession, and plaintiffs, who are collaterals, suing to recover on the ground that they exclude the daughters. The plaintiffs are related to the deceased through his great-great-grandfather.

The plaintiffs have succeeded in the two lower Courts which have followed the decision of this Court in the case No. 1157 of 1892. In that case also the parties were Lund Bilochis, and there was in the first instance a doubt as to the meaning of Section 43 of the *Riwaj-i-am* which is to the effect that "The collaterals in the third degree are entitled to succeed.

"More distant collaterals have no right. In that case (*lit.* at "that time) daughters or their descendants will succeed. *But* "there are no instances forthcoming." The question was as to the meaning of the term *third degree* and there was further inquiry on this point. But when the case came up for final decision it was held that "as the entry (in the *Riwaj-i-am*) is of no "weight it is not very material how the Bilochis calculate "degrees of relationship." "The evidence is now to the effect "that daughters are excluded by *the most distant collaterals*." Further it was held that "the collaterals should not be "deprived of the estate except on evidence of a much more "convincing nature than has been produced in this case."

In that case reference was made only to Section 43 of the *Riwaj-i-am*. But Sections 37 and 38 are also very material. They are to the following effect :—

"37. If there are no male lineal descendants even then "the daughter or her children do not succeed. The collaterals "of the father are the heirs."

"38. In our tribe (Biloch Land) neither daughters nor "sisters succeed except that they may be given something by "written deed."

It may, no doubt, be said of these entries, as of Section 43, that they are not of much weight, the custom alleged being "professedly by an arbitrator one, if not based on precedent." There is one instance given under Section 37, but that relates to this very case and is founded on the assumption that the award of the Revenue authorities (in mutation proceedings) was final, to the effect that Sanjar's widow should succeed him in the first instance, and, after that, the collaterals, to the exclusion of the daughters.

It is not material in this case that the defendants (daughters) have married in the tribe, and the fact that they are in possession of the land can give them no claim.

We find that the defendants (daughters) have failed to prove that they are by custom entitled to exclude the plaintiffs (collaterals), and we dismiss the appeal with costs.

Appeal dismissed.

No. 38.

Before Mr. Justice Stogdon.

APPELLATE SIDE. }

SAGHAR MAL,--(JUDGMENT-DEBTOR),--APPELLANT,

Versus

HYAT,--(DECREE-HOLDER),--RESPONDENT.

Case No. 1482 of 1897.

Civil Procedure Code, 1882, Section 244--Decree for pre-emption—Question whether decree-holder has paid money into Court within time.

On the 19th May 1897, Hyat obtained a decree against Saghar Mal, vendee, for pre-emption of certain land, and it was ordered that on payment by him of Rs. 2,000 purchase-money, by the 28th June 1897, for payment to Saghar Mal, vendee, together with Rs. 29 cost of sale-deed and registration, he should be put in possession of the land, and that, in default of deposit of the said sums, the decree should become void. The decree-holder, by mistake, paid into Court only Rs. 2,000 by the 28th June, and on the 1st July the vendee submitted an application urging that the decree had become void in consequence of the failure of the decree-holder to pay in the whole amount specified in the decree. This application having been rejected, the judgment-debtor (vendee) appealed to the Divisional Judge, but his appeal was dismissed on the ground that no appeal lay.

Held, that the question whether the purchase-money had been deposited in time was one arising between the parties to the suit, in which the decree was passed, and relating to the execution thereof, within the meaning of Section 244 of the Civil Procedure Code.

Held, therefore, that an appeal lay to the Divisional Judge from the order rejecting the application.

Miscellaneous appeal from the order of T. J. Kennedy, Esquire, Divisional Judge, Mooltan Division, dated 4th November 1897.

Jaishi Ram, for appellant.

Oertal, for respondent.

The following judgment was delivered by

18th March 1898. STODDON, J.—On the 19th May 1897 Hayat obtained a decree against Saghar Mal, vendee, for pre-emption of $\frac{3}{4}$ th of the Baghwala well, and it was ordered that on payment by him of Rs. 2,000, purchase-money, by the 28th June 1897 for payment to Saghar Mal, vendee, along with Rs. 29 cost of sale-deed and registration, he should be put in possession of the land, and that, in default of deposit of the said purchase-money, the decree should become void.

The decree-holder by mistake paid into Court only Rs. 2,000 by the 28th June. On the 1st July the vendee submitted an application urging that the decree had become void, in consequence of the failure of the decree-holder to pay in the whole amount specified in the decree.

The Munsif rejected his application on the 22nd July. His appeal to the Divisional Judge was rejected on the ground that no appeal lay.

The Divisional Judge held on the authority of *Muhammad Ali and others v. Debi Din Rai* (I. L. R., IV All., 420) that the question whether the plaintiff had paid the purchase-money into Court within time was not one relating to the execution of the decree, within the meaning of Section 244, Civil Procedure Code, but was one which should be decided in the suit itself. He admitted that this decision was opposed to *Mahtab Singh v. Bela Singh*, *Punjab Record*, No. 32 of 1879, but as the judgment in *Mahtab Singh's* case was based on a construction of Section 11, Act XXIII, 1861, while that in *Muhammad Ali's* case was based on Section 244, Act X, 1877, which is practically identical with Section 244, Act XIV, 1882, he followed the latter. Section 11, Act XXIII, 1861, prescribes, among other things, that any other questions arising between the parties to the suit, in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit. Section 244 (c), Act XIV, 1882, is to the same effect with some unimportant amplifications. Such being the case, the Divisional Judge should either have followed the ruling of this Court, or have given some adequate reasons for not doing so. With all due deference to the opinion of the learned Judges who decided *Muhammad Ali's* case, it appears to me that the question whether the purchase-money had been deposited in time was one arising between the parties to the suit, in which the decree was passed, and relating to the execution thereof. The Divisional Judge has held that it was not between the parties to the suit, because it was only between the decree-holder and the vendee, and not between the decree-holder and the vendee and vendors, but the word "parties" includes some of the parties and does not necessarily mean the whole of the parties. The question between the parties certainly related to the execution of the decree. The decree-holder wished to execute his decree, and the vendee urged in bar of his application that he had lost his right to do so, because he had not deposited the whole of the purchase-money by the date fixed.

I set aside the order* of the Divisional Judge, and remand the case to him under Section 562, Civil Procedure Code, for disposal on the merits. Costs to be costs in the case.

Appeal allowed.

No. 39.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

ISHAR SINGH,—(PLAINTIFF),—APPELLANT,

APPELLATE SIDE. }

Versus

LAL SINGH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Case No. 177 of 1896.

*Occupancy Rights—Alienation by widow in favour of proprietor—Right of reversioner to object—Punjab Tenancy Act, 1887, Section 59 (3).**Held*, that a mortgage of occupancy rights by a widow is void under Section 59 (3) of the Punjab Tenancy Act, 1887, and none the less so because such mortgage is in favour of some of the proprietary body.*Held*, also, that plaintiff, as the reversionary heir to the widow and a co-sharer with her in the holding which was undivided, was entitled to sue for a declaration that such mortgage was void.*Further appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 22nd November 1895.*

Ganpat Rai, for appellant.

The facts of the case sufficiently appear from the following judgment of the Court delivered by

4th June 1898.

CHATTERJI, J.—The material facts of this case are shortly these: Mussammatt Sewan, widow of Lal Singh, an occupancy tenant of Rajajang, on 19th November 1894, executed a mortgage deed of her share of land for Rs. 900 in favour of Gujar Singh and others, some of the proprietors of the holding which is recorded as *shamilat* of *patti* Rupa. Ishar Singh, plaintiff, the brother of Lal Singh, sued for a declaration that the mortgage would not affect his reversionary rights. He is a co-sharer with the widow in the tenancy, and his ground of action is that the alienation was effected without necessity.

The defendants pleaded necessity, and that the widow was competent to mortgage without necessity as occupancy rights and not proprietary interests had been alienated.

The first Court found necessity not proved and gave a decree in plaintiff's favour, but the Divisional Judge held that necessity had been proved to the extent of Rs. 453, and that the mortgage was good for that sum. The plaintiff appeals and the defendants have filed cross-objections under Section 561, Civil Procedure Code.

We are disposed to concur with the first Court that there is no proof of any valid necessity, and the Divisional Judge's

reasoning is insufficient to establish anything more than that the widow had some dealings with the defendants, and had borrowed some money from them. But the true ground upon which the case ought to be decided appears to be that the widow's alienation, whether for necessity or not, is void under Section 59, sub-section (3) of the Punjab Tenancy Act, which declares her incompetent to effect any transfer of the occupancy rights to which she has succeeded except a sub-lease for a term not exceeding one year.

It was argued that transfers to landlords cannot be challenged by the reversioners of a tenant, and No. 31, *Punjab Record*, 1896, was referred to in support of the contention as well as No. 68, *Punjab Record*, 1894. We are of opinion, however, that neither authority is in point. The transfers in those cases were by males. The Tenancy Act contains provisions for the acquisition of the tenant's right by the proprietor, and it was held that where a transfer was made either to the landlord or with his sanction to some one else, the reversioners had no *locus standi* to object. The present is a case of alienation by a widow, and though it is in favour of some of the proprietary body, this circumstance does not affect the operation of sub-section (3) of Section 59, which distinctly forbids all alienations of whatever sort by her except the sub-lease for the limited term mentioned therein. There is no exception made in favour of alienations to proprietors, nor can any such inference be drawn from a comparison of the several sections bearing on the subject of alienations by the tenant. It would seem that the legislature in order to avoid the harassing and expensive litigation which constantly arises in respect of transfers by widows meant to give only a strict life interest in occupancy rights inherited by them from their husbands. There is no provision in the Settlement Record bearing on the question before us which can control the operation of the sub-section, *vide* Section 112 of the Act.

The plaintiff is a co-sharer with Mussammatt Sewan and the holding is undivided. If there is no valid transfer of the portion held by the widow, he would undoubtedly succeed to it on her death by right of survivorship. Had there been no widow he would have succeeded on his brother's death. Under the circumstances, he has clearly a right to sue to have the mortgage declared void. A similar view in respect of the rights of reversioners to object to widow's alienations was held in No. 205, *Punjab Record*, 1889, though the ground

on which we are deciding the present case was not noticed in the judgment. As pointed out above, plaintiff is not an ordinary reversioner, but a joint sharer whose right stands on a much higher footing, and though he has sued on the allegation of want of necessity, and of the widow's incompetency under custom to alienate without necessity, he is entitled to succeed irrespective of these grounds on the statutory provision limiting her power of disposition over the property held by her.

We accept the appeal and restore the decree of the first Court with all subsequent costs. The defendants' cross-objections are dismissed with costs.

Appeal allowed.

No. 40.

Before Mr. Justice Reid and Mr. Justice Gordon Walker.

BUDHE KHAN,—(JUDGMENT-DEBTOR),—APPELLANT,

Versus

BIR BAL,—(DECREE-HOLDER),—RESPONDENT.

Case No. 99 of 1896.

APPELLATE SIDE. }

Execution of decree—Limitation—Civil Procedure Code, 1882, Sections 230, 235—Limitation Act, 1877, 2nd Schedule, Article 179 (iv).

The decree, of which execution was sought, was passed on the 15th July 1880, and an application for execution by attachment and sale of moveable property was made on the 27th October 1882, but as no moveable property could be found, the proceedings were infructuous and terminated. Subsequently, on the 18th October 1883, on a fresh application for execution, the judgment-debtor was arrested and imprisoned, and a small sum of money was realised by sale of a document. On the 29th January 1884 an application was made for execution by attachment and sale of immoveable property of the judgment-debtor. The executing Court dealt with this application as one for a farm of the property, but the error was amended by the Divisional Court on appeal, and proceedings were protracted until, on the 31st October 1891, the Commissioner of the Division refused to sanction sale of the property. On the 31st October 1892 the decree-holder filed an application, setting forth the refusal of the Commissioner to sanction the said sale and his own fruitless endeavours to realise his decree, and praying that the land be sold or a receiver appointed under Section 503 of the Civil Procedure Code. An order for the appointment of a receiver having been made, the judgment-debtor appealed to the Chief Court, and it was contended on his behalf that execution of the decree was barred under the provisions of Section 230 of the Code, and Article 179 (iv) of the 2nd Schedule to the Limitation Act, 1877. It was urged that the application of 1892 was "a subsequent application" within the meaning of the said section of the Code.

Held, that the said application was nearly a petition to the Court seised of, and already executing, the decree on the application of 1884, to take a step in aid of the execution on that application, and was, therefore, not barred under Section 230 of the Code, which does not apply to applications or petition asking the Court to give effect to previous petitions still pending.

Held, further, that inasmuch as proceedings in execution had been pending ever since 1884, execution was not barred by reason of "steps in aid of execution" not having been taken every three years.

Miscellaneous appeal from the order of C. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 28th November 1895.

Muhammad Shafi, for appellant.

Ishwar Das, for respondent.

The judgment of the Court was delivered by

REID, J.—The decree of which execution is sought was 6th June 1898.
passed on the 15th July 1880. An application for execution by attachment and sale of moveable property was made on the 27th October 1882; as no moveable property could be found, the proceedings were infructuous and terminated.

On the 18th October 1883 a fresh application for execution was made, the judgment-debtor was arrested and imprisoned, and about Rs. 28 were realised by the sale of a document. On the 29th January 1884 an application was made for execution by attachment and sale of immoveable property of the judgment-debtor. The executing Court dealt with the application as one for a farm of the property, the Divisional Court on appeal amended this error, and proceedings were protracted until, on the 31st October 1891, the Commissioner of the Division refused to sanction sale of the property.

On the 31st October 1892 the decree-holder filed the following application:—"The Commissioner has refused to sanction the sale of land, regardless of Chief Court rules
" * * * * Although the decree-holder accepted a temporary transfer of the land, the Collector would not sanction it.
" I have done my best to realise the decree, but to no effect.
" I pray that either the land be sold or that a receiver, under Section 503 of the Code of Civil Procedure, be appointed to realise the decree money from the profits of the land, the only alternative left for me being to make this application.
" * * * * * It is requested that either part of the land be sold or a receiver be appointed * * * *
" so as to realise the decree from the profits of the land."

On this application an order was passed for the appointment of a receiver, and from that order this appeal has been filed.

The only point taken for the appellant is that execution is barred by limitation, having regard to the provisions of Section 230 of the Code of Civil Procedure and Article 179 (iv) of the 2nd Schedule of the Limitation Act.

It is urged that the application of 1884 is defective, in that it does not comply with all the provisions (a) to (i) of Section 235 of the Code. It is admitted that the property of which attachment and sale were sought was sufficiently described. This distinguishes the application from that dealt with in *Asgar Ali v. Troilokya Nath Ghose*, XVII Calc. (F. B.), 631, and we hold that it was made "in accordance with law," and could form a fresh starting point under Article 179.

It is further urged that the application of 1892 is a subsequent application, within the meaning of Section 230 of the Code, and that execution is barred by that section. The decisions in *Ram Sahai v. Nanni*, VI All. Weekly Notes, 137, and in *Rahim Ali Khan v. Phul Chand*, I. L. R., XVIII All. (F. B.), 482, are in point, and we have no hesitation in holding that the application of 1892 was merely "a petition to the Court seised of, and already executing, the "decree on the application of 1884 to take a step in aid of "the execution on that application." It is not contended that the property of the judgment-debtor did not remain throughout under attachment, consequent on the application of 1884 and execution is not barred by Section 230 of the Code, which does not apply to an application or petition asking the Code to give effect to a previous petition, still pending. It is obvious that the application in question is not, and does not profess to be, an application under Section 235 of the Code, No. 106, *Punjab Record*, 1894, and *Radha Kissors Bose v. Aftab Chundra Mahtab*, I. L. R., VII Calc., 61, are in point. The rulings quoted, and *Virarama v. Annasami*, I. L. R., VI Mad., 359, and *Panaul Haq v. Kishen Mun Dabee*, IX C. L. R., 297, are fatal to the contention that the order appealed against is bad by reason of its having been passed more than 12 years after the decree, while, in our view that proceedings in execution have been pending ever since 1884, the argument that execution is barred by reason of "steps in aid" not having been taken every three years, fails.

The appeal fails, and is dismissed with costs.

No. 41.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

MUSSAMMAT NIKKI,—(PLAINTIFF),—PETITIONER,

Versus

BISHEN DAS,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Case No. 950 of 1898.

Punjab Courts Act, 1884, Section 40 (i) (ii)—“Point of law involved”
—Question as to burden of proof—Separation deed between husband and
wife—Allegations of misconduct on part of wife—Revision—Civil Procedure
Code, Section 622.

The Divisional Judge granted a certificate of appeal, under Section 40 of the Punjab Courts Act, to the effect that “a question of law is involved, namely, whether a child born in the lifetime of its father is not presumed to be a legitimate one, and whether the *onus probandi* was not on the defendant-appellant to prove the unchastity of his wife, and whether it is not a question of ‘no proof’ about the finding of unchastity of the plaintiff-respondent, and that the case is, in my opinion, of sufficient importance to justify a further appeal.”

Held, that the certificate on the question of *onus probandi* and the mode of decision was not one contemplated in the Act, and was bad.

Semle: The right construction of the word “involved” is that it applies to the case rather than to the appeal which is to be certified under sub-section (i) (d), or admitted under sub-section (ii) of Section 40 of the Act, and includes points which may be raised by way of defence in an appeal.

But *held* that the Divisional Judge had acted with material irregularity, within the meaning of Section 622 of the Civil Procedure Code, inasmuch as (1) he had started a new ground of defence not pleaded by the defendant, viz., that the agreement for separation between the defendant and his wife (the plaintiff) was obtained under pressure, and should not be enforced; (2) he had absolved the defendant from liability, although finding that defendant had committed a breach of the agreement from the beginning; (3) he had wrongly decided the question of *onus* of proof as regards breach of the terms of the agreement, and (4) he had dealt in generalities and conjectures about plaintiff's general bad conduct instead of giving definite findings on the evidence as regards specific misbehaviour on her part.

Although Hindu Law does not recognize divorce, the marriage tie being indissoluble, yet where the finding of a Court, in a suit by the wife for maintenance, would put an end to the plaintiff's conjugal rights, make her an outcast, and probably drive her into the streets for her livelihood, the evidence as to adultery and immorality on her part should be of a definite character as well as cogent and reliable, before the Court acts upon it for the purpose of dismissing her suit.

Section 622 of the Civil Procedure Code lays down the conditions under which the Court may revise the proceedings of subordinate Courts,

and its powers of interference is subject to these conditions. But once the jurisdiction to revise is established on any of the grounds specified in the first part of the said section, there is no limitation imposed on the power of the Court as to the mode of disposal. The section is intended to arm the Court with the power of remedying injustice in cases not subject to appeal under certain specified circumstances, and, therefore, when the grounds of jurisdiction are established and a fit case shown for the exercise of its powers, there is nothing in the section to preclude the Court from finally disposing of the case itself because points of fact, and not points of law, are involved.

The Court finding that defendant had entirely failed to prove breach of the conditions of the agreement between him and plaintiff on the part of plaintiff, or that the latter had been guilty of any immorality, set aside the order of the Divisional Court, and restored the decree which plaintiff had obtained in the first Court.

Petition for revision of the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 21st October 1896.

Ganpat Rai, for petitioner.

Lal Chand, for respondent.

The facts of the case are fully set forth in the judgment of the Court which was delivered by

7th June 1898.

CHATTERJI, J.—The plaintiff is the second wife of the defendant. In 1894 she brought a complaint, under Section 488, Criminal Procedure Code, against her husband in the Court of Sardar Sher Ahmad Khan, Magistrate, Amritsar, for maintenance, but withdrew it on 13th March 1894 on his agreeing to pay her Rs. 8 a month maintenance on certain conditions as to her residence and conduct, which she undertook to observe. She now sues for Rs. 152 arrears for 19 months at the stipulated rate, alleging that her husband never kept his promise beyond letting her live with him for one month after the case. The defendant pleads that plaintiff has broken the conditions subject to which her maintenance was promised, that she has not lived in any house provided by him, and that her conduct has been immoral. Another plea was that the agreement was void as causing separation between husband and wife. There was also a claim for house rent in the plaint, and this was likewise denied by the defendant.

The first Court drew four issues, and found them all in plaintiff's favour, and decreed the claim except as regards house rent. The Divisional Judge on appeal found that the plaintiff's conduct since the agreement had been immoral, and that she had given birth to an illegitimate child. He also considered that the agreement had been brought about by

pressure, and naturally had not been acted on by defendant. He therefore dismissed the suit.

A further appeal has been admitted on a certificate given by the Divisional Judge to this effect "that a question of law is involved, namely, whether a child born in the lifetime of the father is not presumed to be a legitimate one, and whether the *onus probandi* was not on the defendant-appellant to prove the unchastity of his wife, and whether it is not a question of 'no proof' about the finding of unchastity of the plaintiff-respondent, and that the case is, in my opinion, of sufficient importance to justify a further appeal."

It is objected for the respondent that there is no point of law involved, and that the certificate is not a valid one, as it raises no question on which a further appeal can be admitted. After hearing argument on the preliminary objection we have heard argument on the whole case, reserving our decision on the objection.

It is ruled in No. 45, *Punjab Record*, 1894, that the proper allocation of the burden of proof may be in some sense "a question of law"; but it is rather a question incidental to the proceedings in the case between the contesting parties than involved in it, within the meaning of Section 42 (2) of the Punjab Courts Act, and that a mere question of irregularity in the proceedings of the Court of first appeal contained in the judgment, though it may be a question of law, is an incidental question of law, and not a question of law involved in the case within the meaning of the section and sub-section. The matter was discussed in more detail in No. 68, *Punjab Record*, 1897, and a similar conclusion arrived at on the principle of *noscitur a sociis* from the juxtaposition of the words "question of custom" or "general interest" with the words "question of law" in Section 40, sub-section (1) (d) and sub-section (2), the two former expressions clearly not referring to anything relating to the procedure of the inquiry into the case. It would seem therefore that the certificate on the question of *onus* and the mode of decision is not contemplated in the Act and is bad.

It was argued for the appellant that there are other questions of law involved, though not set out in the certificate. One is the question whether the agreement is void as tending to cause separation between husband and wife which forms

the subject of the third issue. But this issue was decided in plaintiff's favour in the first Court, and the finding has not been touched by the Court of Appeal. The appeal therefore does not raise it, and it is so transparently absurd that had we to admit a further appeal under Section 40 (2), we could not do so on the ground that it might be raised by way of defence by the respondent, if the appellant's grounds disclosed no point of law or justified such admission. The right construction of the word "involved" probably is that it applies to the case rather than to the appeal which is to be certified under sub-section (1) (d), or admitted under Section (2), and includes points which may be raised by way of defence in an appeal. For instance, a Divisional Court might erroneously decide an important point of law or custom against a party in his Court, and find in his favour on facts. If no further appeal is held to lie in such a case the question of law or custom can never be considered by this Court; while, if the wider interpretation is accepted, the respondent, on the appeal being admitted, may defend the appeal on such point which can then be adjudicated on here. Having regard to the different wording of Section 584 (a), Civil Procedure Code, by which a second appeal lies only on the ground of the decision of the Court of Appeal being contrary to some specified law or usage, we are inclined to hold that the language employed in sub-section (1) (d) and sub-section (2) of Section 40 indicates a conscious departure from the rule laid down in the former, and admits of the construction we are inclined to put on it. The point is, however, not before us, and we only decide that the question of law mentioned by appellant is not one on which we should feel inclined to admit a further appeal.

It is next urged by appellant that the Divisional Judge has decided on a point of law, *viz.*, that the agreement was an "enforced" one, and probably obtained under pressure, and that effect should not be given to it. It is true that the Divisional Judge has laid considerable stress on such a point, but it did not arise on the pleadings, and was therefore hardly "involved" in the case. It is not also clear that the case is solely decided on this point, inasmuch as the Divisional Judge has given a finding on the evidence, and it is just possible that his meaning is not that the agreement is void on the ground of undue influence. We do not think, therefore, that there is a ground of law made out on which a further appeal can be entertained.

We are also asked by the appellant to interfere on the revision side as the case is before us, and sufficient grounds exist for our taking action under Section 622, Civil Procedure Code. After a careful consideration of the arguments on both sides we are of opinion that this contention must prevail. The judgment of the Divisional Judge does not properly dispose of the case, and teems with irregularities.

In the first place he has started a new ground of defence not pleaded by defendant, *viz.*, that the agreement was obtained under pressure, and should not be enforced. If this means as it ostensibly does that the agreement was not voluntarily entered into by the defendant, and is not binding on him, we consider he had no right to take it up, as not only is it not raised in the pleadings or in the grounds of appeal but is not supported by a tittle of proof. If it means that the defendant entered into the agreement with reluctance it is a matter utterly irrelevant, and should not have entered into the consideration of the case at all.

In the next place, the broad question raised by the pleadings and the issues is whether the plaintiff has committed breach of any of the conditions of the agreement so as to disentitle her to claim maintenance. The first Court finds that that she has not. The Divisional Judge holds that the agreement "has never been acted on for a single month," and that it "resulted in nothing, and defendant gave the woman no money," to use his own language. In other words he finds that defendant has committed breach of the agreement from the beginning, and he almost hints that defendant never intended to abide by it. This, we may observe, demolishes defendant's contention that he hired a house for plaintiff, but that she would not live in it. As regards plaintiff's breaches there is no distinct finding, but the learned Judge speaks at length about a child having been born to plaintiff which he holds to be illegitimate, though there is no reference to it in the proceedings beyond a few questions put to the plaintiff in cross-examination when she gave her evidence. It does not appear whether the Judge was aware that immorality since the agreement alone was relevant, and disentitled plaintiff to maintenance, the agreement being clearly a condonation of past misconduct, if there was any. He was also bound to find that the child was illicitly conceived since the date of the agreement.

Thirdly, the learned Judge is clearly wrong on the question of *onus* of proof as regards breach. Plaintiff as the wife

of defendant and under the specific terms of the agreement is entitled to maintenance. Defendant is liable unless breaches of the conditions of the agreement by plaintiff are proved. Surely it is for him to prove them. Plaintiff cannot prove a negative. Further, as regards the child, the Divisional Judge in finding against the plaintiff on the ground of its birth has failed to notice the conclusive presumption in favour of its legitimacy under Section 112, Evidence Act. His error appears to have been pointed out to him when the application for certificate was made.

Lastly, the Divisional Judge's judgment deals in generalities and conjectures about plaintiff's general bad conduct, instead of giving definite findings on the evidence as regards specific misbehaviour.

In our opinion, there are sufficient grounds for holding that his judgment is unsatisfactory, and that in deciding the appeal he has committed material irregularities in respect of the matters mentioned above.

Interference under Section 622, Civil Procedure Code, is a matter of discretion, and it is necessary to see whether the present is a fit case for the exercise of the powers given to this Court by that section. An examination of the record shows that there are ample grounds for our interference. In a suit like this where a decision adverse to the plaintiff would practically put an end to her marital rights, the allegation of misconduct ought to have been specific. Parties should have been examined as to them, and evidence should have been directed to establish or disprove them. The defendant, however, has made no such allegations, but has contented himself with a general plea that plaintiff has not fulfilled the conditions of the agreement. The manner of production of evidence for the defence is remarkable. On 22nd February 1896 defendant produced six witnesses who say nothing which can be treated as legal evidence of any breach of the agreement on the part of the plaintiff. They certainly prove no immoral conduct on her part. After their statements had been recorded defendant stated that his evidence was finished, but that he wished to produce some witnesses from Lahore, one of whom, Radha Kishen, was present and might be examined.

Radha Kishen was called, but was not found. Defendant finally obtained leave on 24th February on payment of costs to produce fresh evidence. He then called two witnesses, Bhola Singh of Amritsar and Bisheshar of Lahore. The former

deposed to having seen plaintiff openly going about in the streets of Amritsar with loose women for immoral purposes, but admitted that this was some three or four years before the time of his giving evidence. The latter spoke of her going about shamelessly in the bazars of Lahore in the company of strangers. The relevancy of the former's statement appears to be very questionable, and there can be no hesitation in pronouncing the evidence of both to be transparently false. The witnesses both say that the facts they depose to were never mentioned by them to the defendant, which the latter's counsel admits is untrue. Besides this the manner of their production, their connection with defendant and the substance of their evidence leaves no doubt in our minds that they are suborned witnesses. Plaintiff's character cannot in the least be injured by such perjured testimony.

Hindu Law does not recognize divorce, the marriage tie being regarded as indissoluble. The finding of the Divisional Judge, however, puts an end to plaintiff's conjugal rights, makes her an outcaste and drives her into the streets for her livelihood, unless her parents choose, and are able, to maintain her. Had this evidence been produced in a suit for dissolution of marriage under Act IV of 1869, or in an English Divorce Court, it would have been insufficient to establish adultery by the wife. There is no reason why a different rule should be adopted to blast the reputation of a Hindu wife and to deprive her of the rights she has under her status. The evidence as to adultery and immorality ought to be of a definite character as well as cogent and reliable.

As regards the child born by plaintiff, defendant was bound to make its birth a specific point against her if he insisted on its illegitimacy. He did not categorically deny its paternity. Plaintiff's statement regarding it is clear and apparently straightforward, which is but feebly met by defendant's general denial. The defendant is well off, and probably married the plaintiff in the hope of having male issue. This hope has not been fulfilled, and there is good ground for suspecting that acting under the influence of his first wife defendant is treating plaintiff with unkindness.

For these reasons we hold that the case is one in which in the interests of justice we ought to interfere as a Court of revision.

It is argued by the respondent's counsel that we have no power to decide the case on facts, and that if it appears that

the Divisional Judge's judgment must be set aside on the ground of material irregularity we are bound to return the case to him for a fresh decision. After giving the contention our best consideration we are unable to accede to it. Section 622, Civil Procedure Code, lays down the conditions under which this Court may revise the proceedings of Subordinate Courts, and our power of interference is subject to those conditions. But once the jurisdiction to revise is established on any of the grounds specified in the first part of the section there is no limitation imposed on the power of the Court as to the mode of disposal. On the contrary, the last part of the section says that the Court may pass any order it thinks fit. These words must be construed in their plain grammatical sense, as it is not shown that they are used in a special sense. They do not impose any restriction against our deciding the case ourselves, or limit us to doing so on points of law alone, and not on points of fact.

On the contrary, if the aid of any rule of construction is necessary to support the plain meaning of the words we think there are ample grounds for taking a liberal view of our powers. The section is intended to arm this Court with the power of remedying injustice in cases not subject to appeal under certain specified circumstances. If we were compelled in every instance where facts are involved to return the case to the lower Court for re-decision this object would to a great extent be defeated. The legislature cannot be presumed to favour prolongation of litigation or multiplicity of proceedings. When therefore the grounds of jurisdiction are established and a fit case shown for the exercise of our powers, we see no reason, in the face of the plain words of the section, to adopt a construction by which we should be precluded from finally disposing of the case, because points of fact and not simply points of law are involved. The record does not here necessitate, as it generally does in cases of this kind, a remand to the lower Court for a fresh decision. See observations of Stuart, C. J., in *Maulvi Muhammad v. Sayad Hussain*, *I. L. R.*, III All., 203, and *Sarnam Tewari v. Sakina Bibi*, *ibid* 417. Another reason for taking this view is that it seems to be beyond question that the Court has the power to go into facts in order to ascertain whether the grounds of jurisdiction or the conditions of cognizance exist or not. *The Liverpool Gas Company v. Everton*, *L. R.*, 6, C. P., 414, *Shiva Nathaji v. Joma Kashinath*, *I. L. R.*, VII Bom., 341, at page 371. See also *Amritrao Krishna Des Pande v. Balkishna Ganesh Amra Pukar*,

I. L. R., XI Bom., 488, at pages 490, 491. It must also be conceded that in order to decide whether the case is a fit one for the exercise of the powers of revision the Court must look into the facts and have power to do so. These points being conceded, it would be an absurdity to say that the Court cannot consider facts in giving its final order in the case.

Lastly, such power has been exercised by the superior Courts in many instances :— *Shields v. Wilkinson*, *I. L. R.*, IX All., 398, No. 68, *Punjab Record*, 1897.

In this case both the Courts below have given their opinion on the evidence, though the Divisional Judge has acted with material irregularity in mixing up irrelevant matters and in laying down the burden of proof. There is no necessity whatever for returning the case to the latter for a fresh judgment on the evidence. Further, in our opinion the defendant has entirely failed to prove breach of the conditions of the agreement between him and the plaintiff arrived at in the Criminal Court in 1894, or to show that plaintiff has been guilty of any immorality. Under these circumstances the plaintiff is entitled on the present record to the decree which she obtained in the Court of first instance, and this relief should be given her.

We treat this case as an application for revision, and accepting it set aside the decree of the Divisional Judge, and restore that of the first Court with all subsequent costs.

Application allowed.

No. 42.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

MUHAMMADI AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MUSSAMMAT JIWANI AND OTHERS.—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 308 of 1896.

Declaratory decree, suit for by reversioner—Speculative suit—Specific Relief Act, 1877, Section 42.

Plaintiffs sued for a declaration that, after the death of Mussammat J. who was at the time in possession of the property, with a widow's interest, they were entitled to succeed to it. Their suit was dismissed by the Divisional Judge on the ground that the widow had not done any act or made any alienation of the property which might raise an apprehension

of injury to plaintiffs' rights, there being no allegation that any denial of their rights was made before the institution of the suit.

Held, that the suit had been rightly dismissed.

Further appeal from the order of Khan Muhammad Hayat Khan, C S.I., Divisional Judge, Jullundur Division, dated 31st January 1896.

Browne for appellants.

Jaishi Ram, for respondents.

The judgment of the Court was as follows :—

7th June 1898.

GORDON WALKER, J.—Plaintiffs' suit is for a declaration that, after the death of Mussammat Jiwani (defendant), who is now in possession of the property with a widow's interest, they are entitled to succeed to it. The Divisional Judge has dismissed the suit on the ground that "the widow (Mussammat Jiwani) has not done any act or made any alienation of her husband's property which may raise an apprehension of injury to their (plaintiffs') rights.....It is not alleged that a denial was made before the institution of the suit.....It follows that, as against Mussammat Jiwani, plaintiffs have no cause of action according to their plaint, and as a decree for a declaration of right depends on the discretion of the Court, it seems to me that it cannot be said to be a sound exercise of discretion to pass a decree merely on the ground that such and such a person has made a verbal denial of plaintiffs' reversionary rights."

We think that the Divisional Judge has rightly dismissed plaintiffs' suit on these grounds, and that a plaintiff cannot, on a mere denial by some one of his title as reversioner, there being no overt act against or attempt to interfere with his reversionary rights, obtain from the Court a declaration under Section 42 of the Specific Relief Act. Such a suit would be purely speculative in its nature, the plaintiff merely seeking to obtain from the Court an expression of opinion as to what his title would be under a condition of circumstances which may never arise.

In *Punjab Record*, 94 of 1879, the question was considered as regards the law (Section 15 of Act VIII of 1859) in force before the passing of the Specific Relief Act. In the case *Bhujendro Bhusan Chatterjee v. Tregunanath Mukerjee and others* reported at VIII Calc., page 76, the change introduced by the Act is noticed, and with regard to the provisions of Section 42 it is observed in the judgment in that case that "to hold other-

“wise (that is, to hold that a declaratory decree should be given
 “in a suit of the nature of that under consideration), would be
 “to lay down that any one who claims any interest in property,
 “present or future, ought to be allowed to ask the Court to give
 “him an opinion as to his title, and it cannot, I think, have been
 “the intention of the Legislature to lay down any such rule”
 (Wilson, J).

We think, therefore, that the Divisional Judge is right in holding the plaintiffs in this case not to be entitled to the relief asked for, and that their claim has been rightly dismissed.

The appeal is dismissed with costs.

Appeal dismissed.

No. 43.

Before Mr. Justice Frizelle, Chief Judge.

KHUSHALI MAL,—(PLAINTIFF),—PETITIONER,

Versus

PALA MAL AND OTHERS,—(DEFENDANTS),—
 RESPONDENTS.

} REVISION SIDE.

Case No. 700 of 1898.

Civil Procedure Code, 1882, Section 136—“Decree”—Appeal.

An order under Section 136 of the Civil Procedure Code, dismissing a suit is a decree from which an appeal lies.

Petition for revision of the order of S. S. Harris, Esquire, Additional District Judge, Ferozepore, dated 24th January 1898.

Harris, for petitioner.

The judgment of the learned Chief Judge was as follows :

FRIZELLE, J.—The dismissal of the suit under Section 11th June 1898. 136 was a decree from which an appeal lies—*vide I. L. R., VII All., 159*. This application for revision therefore cannot be entertained, and is rejected.

Application dismissed.

No. 44.

Before Mr. Justice Reid.

APPELLATE SIDE. {

BASHESHAR DAS,—(PLAINTIFF),—APPELLANT,

Versus

BHAGWAN DAS AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

Case No. 517 of 1898.

Mortgage deed relating to immoveable property—Deed compulsorily registrable, but registered in wrong Registry Office—Admissibility of deed in evidence—Registration Act, 1877, Section 49—Fraud.

Held, that the mere fact that a mortgage-deed, which is compulsorily registrable, has been registered in a wrong Registry Office, does not render such deed inadmissible in evidence as against a purchaser at execution sale of the land mortgaged, who, not knowing that such land was subject to mortgage, does not plead that he was misled by the deed not being registered at the proper office, or that he was induced to purchase because, on inquiry, at the latter office, he learnt that there was no outstanding incumbrance.

A plea that the said mortgage was in fraud of creditors, *held*, not established.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 12th February 1898.

Lajput Rai, for appellant.

Dharam Das, Suri, for respondents.

The facts of the case sufficiently appear from the following judgment delivered by—

15th July 1898.

REID, J.—Mula, respondent, was mortgagee, with possession of certain land in the Gurdaspur District, under two deeds, dated August 1883 for Rs. 99 and Rs. 72, and obligee under a bond dated July 1892 for Rs. 140.

On the 30th August 1893 he transferred his rights under these three deeds for Rs. 200 to the appellant, Basheshar Das, son of his sister's daughter, by sale deed registered at Amritsar on the 30th August 1893.

On the 26th July 1895 the respondent, Bhagwan Das, obtained an *ex-parte* simple money decree against Mula for Rs. 94-6-3, including costs, and on the 8th August 1895 applied for execution, by attachment of the judgment-debtor's right under the above-mentioned mortgages, and eventually purchased the same in execution and obtained possession. The appellant objected, but his objection was overruled. He filed a suit, for possession of the mortgaged land, which has been

dismissed by the lower Appellate Court on the ground that the transfer was fraudulent and with the object of defeating the creditors of Mula, and also, apparently, on the ground that the sale-deed in favour of Basheshar Das was inadmissible in evidence under Section 49 of the Registration Act, being compulsorily registrable, and not having been registered, in accordance with law, in an office within the jurisdiction of which some part of the mortgaged property was situate. The first plea taken in appeal is that the sale-deed was not compulsorily registrable, the mortgage-deeds being moveable property. No authority has been cited in support of this plea, which must be overruled. A transfer of two mortgages of land aggregating Rs. 171 obviously purports or operates to create and assign an interest of the value of more than Rs. 100 in immoveable property.

The next plea is that registration in the wrong office does not render the sale-deed inadmissible in evidence.

67, *Punjab Record*, 1883, *Sheo Shunkur Sahoy v. Hirdey Narain Sahu*, I. L. R., VI Calc., 25, *Ram Coomar Sen v. Khoda Neway*, VII Calc., L. R., 223, and *Har Sahai v. Chuni Kuar*, I. L. R., IV All., 14, are relied on, and are authority for holding that when registration has been effected in the wrong office the fault is the Registrar's and the deed is admissible in evidence. *Beni Madhab Mitter v. Khatir Mondul*, I. L. R., XIV Calc., 449, is authority to the contrary, and there is force in the contention relied on in that case, that the judgment of their Lordships of the Privy Council in *Sah Mukhan Lall Panday v. Sah Koondun Lall*, XV B. L. R., 228, relied on in VII Calc., L. R., dealt with a case in which registration was in the right office, but in the absence of some of the parties to the deed.

67, *Punjab Record*, 1883, dealt with a case in which a son who had full knowledge of a mortgage-deed executed by his father and registered in a sub-district office within the local jurisdiction of which the property was not situate though it was situate in the same district, sought to set aside the mortgage-deed as invalid for defect of registration. The appeal was to a great extent decided on the ground that the plea did not lie in the mouth of the son, who had knowledge of the deed. There is a similar qualification in the other cases quoted for the appellant, except in the C. L. R. case, in which the purchaser at execution sale of the property mortgaged, apparently without knowing that it was subject to mortgage, did not plead that

he was misled by the mortgage-deed not being registered in the proper office, or that he was induced to purchase because, on inquiry at that office, he learnt that there was no outstanding incumbrance. He simply sought to get rid of the deed through a defect in registration.

The respondent, Bhagwan Das, is in exactly the same position, and I see no reason to hold that the registration at Amritsar was not effectual for the purposes of Section 49 of the Registration Act. The question whether there was fraud is of course affected by the registration at Amritsar, and it is contended that the transfer, for Rs. 200, of securities worth Rs. 311, coupled with the failure to register at the proper office and the near relationship of the parties to the deed, proves fraud.

The transferee admittedly lives at Amritsar and the land mortgaged is admittedly not far from that town, though in another district, and there was room for reasonable doubt as to the sale-deed being compulsorily registrable. Had there been fraud, it was as easy for Rs. 311 to have been entered in the deed as for Rs. 200, and it has not been shown that Mula was so heavily involved in 1890 or 1893 that the transfer could be assumed to be in fraud of creditors, and lastly it has not been shown that Rs. 311, or anything like that sum, could have been realised by the transferee.

The relationship must of course be considered, among other matters, in deciding the question of fraud or no fraud, but on the facts I see no reason for holding that the transfer was fraudulent. Had the objection been taken by a collateral, seeking to set aside an alienation of ancestral property by registered deed the matter would have been very different, but, as it is, I think the Court of first instance rightly held that the sale-deed was in lieu of a debt some years antecedent to its execution and still further antecedent to the decree of the respondent, Bhagwan Das, and effected a transfer of the mortgagee rights in the land in suit.

I decree the appeal with costs here and below. If Registrars and Sub-registrars did their duty under Sections 66 and 67 of the Act, it would be practically immaterial in which office registration is effected.

Appeal allowed.

No. 45.

Before Mr. Justice Reid.

SAWAN MAL,—(PLAINTIFF),—APPELLANT,

Versus

DEVI DIAL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 632 of 1898.

Oaths Act, 1873, Section 11—Evidence given by person on oath, effect of, as regards person offering to be bound thereby—Civil Procedure Code, 1882, Section 562.

Under Section 11 of the Oaths Act, 1873, the evidence given by a person on oath is, as regards the party who offered to be bound thereby, conclusive proof merely of the matter stated and of nothing further.

Where, therefore, in a suit by plaintiff for Rs. 550 profits lost by plaintiff through the default of N. C. and another, defendants, to deliver gram during one month at contract rate, and for Rs. 80 earnest-money paid to N. C., it appeared that one D. D., defendant, who made the contract as a broker and was alleged to have been a surety for its due performance, challenged N. C. to the oath, saying that if N. C. would swear that he (N. C.) had not received the earnest-money, he himself would be responsible for the plaintiff's claim, and the said N. C. thereupon swore that he had not received the said earnest-money, *held*, that such statement, on oath, merely concluded the question whether N. C. had or had not received such earnest money.

Held, therefore, that the first Court had erred in regarding the oath so taken as *per se* sufficient ground for decreeing the suit as against D. D., and dismissing it as against the other defendants.

Held, further, that inasmuch as the first Court had decreed the suit merely on the oath taken, and had not decided any of the five issues which it had framed, the lower Appellate Court had rightly remanded the case under Section 562 of the Civil Procedure Code.

Miscellaneous further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 9th May 1898.

Robinson, for appellant.

Madan Gopal and Sham Lal, for respondent.

The following judgment was delivered by—

REID, J.—The plaintiff-appellant and Devi Dial, defendant-respondent, agreed to be bound by the oath of Nihal Chand, defendant, if he would swear that he had not received Rs. 80 as earnest-money from the plaintiff. Devi Dial challenged Nihal Chand to the oath, saying that if Nihal Chand would swear that he had not received the earnest-money he himself

15th July 1898.

would be responsible for the plaintiff's claim, which included Rs. 550 profits lost by the plaintiff through the default of Nihal Chand and another defendant to deliver gram during one month at contract rate, and Rs. 80 earnest-money paid to Nihal Chand.

Devi Dial himself and two other defendants were brokers, through whom the contract was made, and are also alleged to have been sureties for the due performance of the contract.

The plaintiff simply bound himself to abide by Nihal Chand's statement on oath, which was to the effect that he had not received Rs. 80 earnest-money for gram on account of the plaintiff.

On the oath being taken to this effect the Court of first instance decreed the suit against Devi Dial, and dismissed it as against the rest of the defendants.

Devi Dial appealed to the Divisional Judge, alleging that Nihal Chand had not taken the oath agreed upon, that Section 11 of the Oaths Act did not apply to the case, that he had not agreed to be bound by Nihal Chand's oath, that there were no materials for a decree, and that a decree could not be pressed against him alone as a surety.

The Divisional Judge remanded the suit under Section 562 of the Code of Civil Procedure, apparently on the ground that the oath referred only to the earnest-money, and that the suit could not be decided on the oath alone, though other questions were discussed in the judgment.

The first point taken in appeal is that the suit was not decided on a preliminary point, and that Section 562 is therefore inapplicable. Of five issues framed by the first Court, not one was decided. I must, therefore, hold that the decision on the oath was a decision on a preliminary point.

The next point taken is that the Court of first instance was right in decreeing the claim in full against Devi Dial on Nihal Chand's oath. Against this contention there are two authorities, *Vasudeva Shanbog v. Naraina Pai*, I. L. R., II Mad., 356, and *Muhammad Zahur v. Cheda Lal*, XIV All., 141.

In the Madras case it was held that the mere agreement of one of the parties to a judicial proceeding to be bound by the oath of the other is in itself no adjustment of the suit, and that, if the matter stated in the agreement is sufficient, as the ground of a decision, a judgment may be passed, for then it would be conclusive evidence under the Oaths Act.

In the Allahabad case Straight, J., said "the Oaths Act does not constrain a Court to pass a decision in favour of a particular party. If a party to a suit says he will be bound by the oath of a particular person, as read by the light of Section 11 of that Statute, it means no more than this, that *pro tanto* he will be bound, that is to say, so far as the matter of that evidence is concerned, and that evidence will be conclusive as to its truth, and the truth of that evidence will be conclusive as against him throughout the whole of that litigation.....The Court.....may act solely upon that evidence.....but, on the other hand, it may be unwise in some cases to do so."

It is possible that the non-receipt of earnest-money by Nihal Chand is fatal to the plaintiff's claim, either as proving that the transaction was one of gambling, or that there was no complete contract, but the Court of first instance has not discussed and decided this question.

I think there can be no doubt that Nihal Chand's statement, on the oath taken, concluded only the question whether he had or had not received the earnest-money in question, and in that view the lower Appellate Court rightly remanded the suit. It is obvious that the Oaths Act does not contemplate that the evidence given on oath shall, as against the person who offered to be bound by it, be conclusive proof of anything beyond the matter stated. Section 11 is clear on that point. The appellant's offer to be responsible for the whole claim was outside the scope of Chapter IV of the Oaths Act. The appeal is dismissed. Counsel for the principal defendants, who have been made respondents, asks for costs on the ground that his clients have been unnecessarily made respondents. Having regard to their conduct throughout the suit, I do not think they are entitled to costs. The appellant will pay the costs of the plaintiffs-respondents.

Appeal dismissed.

No. 46.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

APPELLATE SIDE. {

MUSSAMMAT NEKHAN,—(DEFENDANT),—APPELLANT,

Versus

MUHAMMAD KHAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Case No. 887 of 1897.

Punjab Courts Act, 1884, Sections 26, 75—"Business" and "functions" of District Court—Power of District Judge to assign function of trying a case to Additional District Court—Case in excess of pecuniary limits of latter Court's jurisdiction.

Section 75 of the Punjab Courts Act must be construed in consonance with Section 26 of the Act, and it is, therefore, not competent to a District Judge by any act of his under sub-section (2) of Section 75 to extend the powers conferred on Judicial Officers by the Local Government under Section 26.

The "business in the Court of the District Judge" spoken of in Section 75 (1) of the Act means business it has to dispose of as the District Court, and the "functions" mentioned in sub-section (2) of the said section are functions proper to such Court and must be such as a Sub-Judge of the highest class is unable to discharge, and do not mean the mere trial of civil suits of the value of over Rs. 5,000.

First appeal from the order of Khan Bahadur Raja Jahandad Khan, Additional District Judge, Rawalpindi, dated 30th June 1897.

Pestonji, for appellant.

Beechey, for respondent.

The facts of the case sufficiently appear from the judgment of the Court delivered by

13th June 1898.

CHATTERJI, J.—This case was originally valued at Rs. 3,280-11-0 and was sent for trial to the Court of the Additional District Judge of Rawalpindi, Diwan Lakhmi Das. On his transfer it was taken up, inquired into and decided by his successor, Raja Jahandad Khan. While it was pending before Diwan Lakhmi Das, a commission was appointed for valuation of the subject-matter of the suit, and the value for purposes of jurisdiction was ultimately assessed at Rs. 7,369-4-1.

It is now objected in appeal that Raja Jahandad Khan had no jurisdiction to try the suit. It appears that the Raja's ordinary civil powers were those of a second class Subordinate Judge. By Punjab Government Notification

No. 118, dated 21st January 1897, he was appointed Additional District Judge of Rawalpindi, but by Punjab Government Notification No. 119 it was pointed out that his ordinary civil powers were limited as above. Apparently through inadvertence, the increase in the value of the suit, through the revised estimates of the commissioner, to a figure above the pecuniary limits of his jurisdiction was not noticed by the Raja when he disposed of it.

Mr. Beechey contends that the Local Government was not competent to limit the jurisdiction of the Additional District Judge and that on the District Judge assigning the function of trying the suit to Raja Jahandad Khan he became for the purpose of discharging such function a District Judge with all the powers of a District Judge under the Punjab Courts Act, which are unlimited. He further argues that if there is no order of the District Judge specially sending the case to the lower Court for disposal the fact that the case remained under trial in that Court to the knowledge of the District Judge without objection is tantamount to an order assigning the function of trying it to the Court, which need not be expressed in writing.

We cannot accede to this contention. It is obvious that the business in the Court of the District Judge spoken of in Section 75, sub-section (1) of the Punjab Courts Act means business it has to dispose of as the District Court, and the functions mentioned in sub-section (2) are functions proper to such Court, and the mere trial of civil suits of the value of over Rs. 5,000 is not intended. For the trial of such suits it is not necessary that the Court should be a District Judge. A Sub-Judge of the first class would be competent to hear them. The aid of an Additional District Judge is not required for this purpose. The functions meant in sub-section (2) must be such as a Sub-Judge of the highest class is unable to discharge and which must be performed by a Court having the status of a District Court, *e.g.*, the disposal of applications for certificates under the Succession Certificates Act, Guardian and Wards Act, insolvency cases under the Code of Civil Procedure and the like. Moreover, it would be a repugnant construction to hold that the powers conferred on Judicial Officers by the Local Government under Section 26 of the Act might be extended by an act of the District Judge under sub-section (2) of Section 75. We think it is proper to construe Section

75 in consonance with Section 26, as appellant's pleader argues.

We hold, therefore, that the defect of jurisdiction of the lower Court is established.

We accept the appeal and reverse the decree of the lower Court and return the case to the District Judge for trial by himself or some other officer of competent jurisdiction. Parties to pay their own costs up to date.

No. 47.

Before Mr. Justice Frizelle, Chief Judge.

BUTA SINGH,—(JUDGMENT-DEBTOR),—APPELLANT,

Versus

CHANDA SINGH,—(DECREE-HOLDER),—RESPONDENT.

Case No. 372 of 1898.

APPELLATE SIDE. }

Pre-emption—Decree directing money to be paid into Court by certain date but not stating consequences of non-compliance—Execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.

Where a decree in a suit for pre-emption directed that the sum for which pre-emption was decreed should be paid into Court by a certain date, but omitted to declare that if such sum was not paid on or before the said date, the suit should stand dismissed. *Held*, that such omission in the decree did not extend the time within which the plaintiff could pay the money, the plaintiff being bound nevertheless to pay the amount into Court within the time fixed.

In such a case when the plaintiff failed to pay the amount into Court within the specified time,

Held, that the decree had become one incapable of execution, and was not governed by Article 179 of the Limitation Act, which only applies to decrees capable of execution.

Miscellaneous appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 14th March 1898.

Lal Chand, for appellant.

Rup Lal, for respondent.

The judgment of the Court was as follows :—

18th June 1898.

FRIZELLE, C. J.—This is an appeal from an order passed in execution of a decree for pre-emption. The judgment was in English and ordered that the amount for which pre-emption was decreed (Rs. 2,000) should be paid into Court by the 15th June. A decree was drawn up in English to the same effect, but not declaring that if the money was not paid on or before the specified date the suit should stand dismissed. A

decree in vernacular was also drawn up, and it declared that if the money was not paid by the date fixed the decree should be null and void (*kaladam*). The money was not tendered in Court until the 18th June, and the decree-holder stated in his application tendering it and asking for execution that as it was a large amount he was unable to raise it sooner. The first Court rejected the application for execution as the money had not been paid within time. On appeal the Divisional Judge reversed this order and ordered execution to issue on the ground that the decree did not state, as it ought to have done according to Section 214, Civil Procedure Code, that if the money was not paid within the prescribed time the suit should stand dismissed.

I am of opinion that this omission in the decree does not extend the time within which plaintiff could pay the money. The declaration as to the effect of non-payment within the prescribed time was merely one which the decree ought to have contained. But although it did not contain it plaintiff was nevertheless bound to pay the money within the time fixed, and when he did not do so it would be contrary to the decree to allow him to make the payment afterwards, and the decree consequently becomes one that he cannot execute. This view is in accordance with *I. L. R.*, *XIV All.*, 529, and hardly requires any argument to support it. It follows from the very nature and terms of the decree. No decision has been quoted to the contrary. The one chiefly relied on for respondent is *Punjab Record*, No. 10 of 1895, but that does not touch on the question. It was a case in which no time was fixed for payment of the pre-emption money.

Respondent's pleader contends that the present case is governed by the ordinary limitation law regarding execution of decrees (Article 179 of the 2nd Schedule to the Limitation Act). But the decree now in question by providing that the money must be paid by a certain date, meant that it could not be executed after that date if the money was not paid, and as long as plaintiff did not get the decree altered he was only entitled to execution according to it. Article 179 can only apply to decrees which are capable of execution when the application is made, and not to decrees which are no longer of any force.

I have regarded the matter as if the English decree had been the only one and as if the vernacular decree should not be taken into consideration.

I set aside the order of the Divisional Judge and restore that of the first Court with costs.

No. 48.

Before Mr. Justice Frizelle, Chief Judge.

APPELLATE SIDE. {

TEJ RAM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

TULSI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Case No. 674 of 1898.

Appeal—"Land suit"—Right in tank used for watering cattle and excavating earth to make bricks.

Plaintiff sued for declaration of right in a tank, valued at Rs. 900, which was used for watering cattle and excavating earth to make bricks.

Held, that, as these were not agricultural purposes or purposes subservient to agriculture, the tank was not "land" as defined in the Punjab Tenancy Act, and that, therefore, no further appeal lay.

Further appeal from the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 16th April 1898.

S. P. Roy, for appellant.

The judgment of the learned Chief Judge was as follows :

18th June 1898.

FRIZELLE, C. J.—No appeal lies in this case. The suit is for declaration of right in a tank valued at Rs. 900. The tank is used for watering cattle and excavating earth to make bricks. These are not agricultural purposes or purposes subservient to agriculture. The tank therefore is not land as defined in the Punjab Tenancy Act. Appeal rejected.

Appeal dismissed.

No. 49.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

AULIA,—(DEFENDANT),—APPELLANT,

Versus

ALU,—(PLAINTIFF),—RESPONDENT.

Case No. 7 of 1897.

Custom—Alienation—Gift by sonless proprietor to first cousin who was also his uterine brother—Awans of tahsil Khushab, Shahpur District.

One M., a full proprietor, before his death executed a deed of gift of his land in favour of his first cousin, who was also his uterine brother, and put him in possession. The parties were Awans of mauza Mardwal, Khushab tahsil, Shahpur District.

Found, that the said gift was valid by custom

APPELLATE SIDE. {

Further appeal from the order of D. C. Johnstone, Esquire, Divisional Judge, Jhelum, dated 26th August 1896.

Sham Lal, for appellant.

Miran Bakhsh, for respondent.

The judgment of the Court was delivered by

ANDERSON, J.—This was a case amongst Awans of *mauza* 25th July 1898. Mardwal, *tahsil* Khushab, District Shahpur. Before his death Makhana, a full proprietor, executed a deed of gift conveying 5 *bighas*, 2 *kanals*, 18½ *marlas* of land to his first cousin and uterine brother Mitha and put him in possession. The local *Wajib-ul-arz* provided that a sonless proprietor may during his lifetime give his estate to his daughter or daughter's son or *pichlag* son or one of his collaterals or adopted son provided that the gift be put in writing. The lower Court held this entry to be insufficient without proof of instances, but in accordance with the rulings contained in *Punjab Record*, No. 52 of 1896, its effect was to throw the burden of proof on the plaintiff. There were numerous instances in which a custom in favour of such gifts by Awans of Khushab *tahsil* has been upheld by this Court, *e.g.*, *Punjab Record*, Nos. 33 and 36 of 1891, where gifts in favour of sister's sons were set aside only because not completed by possession. In *Punjab Record*, No. 79 of 1896, a case from this identical village, it was held that a gift in favour of a wife's brother who was also a remote collateral was valid in presence of the donor's half brothers. The first Court then found (see page 252) that there were eight instances of gift in Mardwal itself.

In the case before us the lower Court has referred to a number of rulings as showing the custom of Awans (presumably relating to gifts), but most of these have no special application to the present case. In *Punjab Record*, No. 81 of 1894, it was held that amongst Awans of the Talagang *tahsil* of Jhelum District there was no custom authorizing a father to make a gift to his daughter in the presence of sons, a very different case from the present.

The Divisional Judge held that the decision of the lower Court on the point of custom was of course sound and considered that the appellant's pleader withdrew his fourth ground of appeal. If this was a fact the pleader certainly made a great mistake, as *Punjab Record*, No. 79 of 1896, was distinctly in favour of the existence of the custom set up by his client and relied on in his appeal.

It is unnecessary under the circumstances to consider defendant's second plea that he had spent money on behalf of Makhana in funeral expenses and payment of debts, in respect of which both Courts refused to allow him to produce evidence, holding him bound by the terms of the deed of gift, which naturally contained no allusions to payments which the defendant does not allege to have been made for many years subsequent to 1886. The defendant has an excellent case, having been put in possession in 1886 and the custom under which he claims having been well established, since he is a near collateral as well as a uterine brother of the donor.

We accept this appeal, set aside the decree and order that respondent bear appellant's costs throughout.

Appeal allowed.

No. 50.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

MUSSAMMAT WAZIR BEGAM,—(DEFENDANT),—
APPELLANT,

Versus

MUSSAMMAT PIYARI BEGAM,—(PLAINTIFF),—
RESPONDENT.

Case No. 355 of 1896.

Appeal—Civil Procedure Code, 1882, Sections 375, 622—Offer made by defendant pendente lite to settle case—"Compromise"—Decree based on plaintiff's acceptance of offer—Offer repudiated by defendant—Power of pleader to compromise suit.

Plaintiff's suit, which was filed on 7th May 1895, was in respect of one-third of the estate of one F. J., deceased, which plaintiff claimed as F. J.'s sister. On the 18th June the pleas of a co-defendant, who had taken part of the disputed property in mortgage from the real defendant, Mussammat W. B., deceased's widow, were filed, and the latter's advocate applied for, and obtained, an adjournment in order that a compromise might be come to. After another adjournment the case was fixed for the 15th October, on which date Mussammat W. B. was represented by a pleader who stated his oral pleas on her behalf and concluded with the words "If plaintiff is still willing to receive Rs. 2,000 in satisfaction of "all claims, defendant No. 1 is willing to pay. If not, she cannot recognize "any claim of the plaintiff."

Thereupon the parties appear to have applied for a further postponement in order that the case might be settled out of Court, and the 23rd October was fixed for the next hearing. On that date nothing was said on either side about any compromise or defendant's offer, but defendant's pleader got additional pleas on the merits recorded. The case was then adjourned (for no special reason) to the following day, when plaintiff's

APPELLATE SIDE. {

recognized agent, acting on a fresh power-of-attorney, dated the day before and in supersession of a previous power in his favour, stated that plaintiff was willing to take Rs. 2,500 in full satisfaction of her claim and to forego costs. Defendant's pleader (who was other than the pleader through whom the offer of the 15th October had been made) replied that he had that day been instructed to say that his client did not agree to pay Rs. 2,500, and that if the Court gave a decree, it must be against the estate. To this plaintiff's pleader objected. The Court held that the offer of the 15th October was subject to no such qualification, and gave a decree in plaintiff's favour for Rs. 2,500 "on the pleadings as they stand." This decree was at first modified by the Divisional Judge, on appeal, but was subsequently restored by him on review. Defendant appealed to the Chief Court, and it was objected, on plaintiff's behalf, that the decree fell within the purview of Section 375 of the Civil Procedure Code, and was therefore final.

Held, that, whether or not the decree in the present case fell under the said section, the procedure of the District Judge was sufficiently tainted with material irregularities to justify interference under Section 622 of the Code.

Seemle :—Under the circumstances of the case an appeal was competent.

Held, that the material irregularities committed by the District Judge were (i) in stating that his decree was based on the pleadings, when in fact the said decree was not made with reference to any material allegation of fact or proposition of law relating to the subject-matter of the suit made or affirmed by one side and admitted by the other; (ii) even assuming that the Court had power to pass such a decree, in not enquiring, as it was bound to do, into the objections of defendant, whose pleaders should have been asked whether his repudiation meant that the original offer had not been made with authority or merely that it was withdrawn and the acceptance too late; (iii) in not making any inquiry as to whether defendant's pleader had express authority to make the offer of the 15th October; (iv) in assuming that the said offer was still binding on the 24th October, and in proceeding to pass a decree in accordance with its terms without further inquiry.

Held, therefore, that the decrees of the lower Courts must be set aside.

A pleader has not power without express authority from his client to bind him by a compromise.

Further appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 14th March 1896.

Lal Chand and Browne, for appellants.

Ali Hussain, for respondent.

The judgment of the Court was as follows :

CHATTERJI, J.—The material facts are briefly these. The 27th July 1898.
plaintiff, Mussammat Piyari Begam, claimed one-third of the estate of the late Fakir Jamal-ud-din as his sister. The suit

was filed on 7th May 1895. On 18th June the pleas of a co-defendant who had taken part of the disputed property in mortgage from the real defendant, Mussammat Wazir Begam, the deceased's widow, were filed, and Mr. Amin-ud-din, her advocate, asked for, and obtained, an adjournment in order that a compromise might be come to. After another adjournment the case was fixed for the 15th October. On that date Maulvi Fazl Din appeared for Mussammat Wazir Begam and stated his oral pleas on her behalf which wound up with these words, "If plaintiff is still willing to receive Rs. 2,000 in satisfaction of all claims, defendant No. 1 is willing to pay. If not she cannot recognize any claim of the plaintiff." According to the District Judge's autograph record the parties then again applied for a postponement in order that the case might be settled out of Court, and the 23rd October was fixed for the next hearing. On that date Lala Gobind Ram appeared for the plaintiff and Messrs. Lal Chand and Fazl Din for the defendant. Nothing was said on either side about any compromise or defendant's offer of the 15th October, but Mr. Lal Chand got additional pleas on the merits recorded. The case was then put off for the next day without any special reason. On the 24th Sayad Akbar Ali, recognized agent of the plaintiff, acting on a fresh power-of-attorney dated the day before and in supersession of a previous power in his favour, stated that plaintiff was willing to take Rs. 2,500 in satisfaction of her claim and to forego costs. Mr. Lal Chand's reply was that he had been that day instructed to say that his client did not agree to pay Rs. 2,500, and that if the Court gave a decree it must be against the estate. To this plaintiff's pleader objected. The Court held that the previous offer made by Maulvi Fazl Din was subject to no such qualification and gave a decree in plaintiff's favour for Rs. 2,500 "on the pleadings as they stand."

This decree was appealed to the Divisional Judge, who at first made some strictures on the procedure adopted by the District Judge and modified the decree by converting it into one against the estate of the deceased. On review, however, he restored the original decree of the District Judge.

The first question for consideration is whether the decree was one based on a simple confession of judgment or on a compromise within the meaning of Section 375, Civil Procedure Code. In our opinion the decree was not of the former

character, as the defendant did not admit any part of the claim as laid but made an offer of a lump sum in satisfaction of the same. The decree partakes of the nature of one founded on a compromise, but owing to the peculiar procedure adopted by the District Judge it is difficult to say that it falls within the purview of Section 375, Civil Procedure Code, and is on that account final. The majority of the Chartered High Courts and this Court are agreed that when a compromise has been agreed upon between parties to a suit, the Court can proceed under Section 375 even if one of the parties withdraw or refuse to admit that there has been a compromise, and that it can inquire and decide whether in fact a compromise has been effected or not. But it is extremely doubtful whether a decree passed under the circumstances of the present case, where in fact an offer is made on a particular date by one party without specifying the time for acceptance, and when after several days the other party notifies its acceptance which the first party declines to accept as too late, but which the Court nevertheless treats as binding, can be said to fall under Section 375. The point is of importance only to see whether an appeal is competent. We are disposed to hold that it is. Even if it were otherwise and the decree held to be one falling under Section 375, we are of opinion that the procedure of the District Judge is sufficiently tainted with material irregularities to justify our interference under Section 622, Civil Procedure Code.

The first error to be noticed is that the District Judge says that his decree is based on the pleadings. This is not the case. The decree is not made with reference to any material allegation of fact or proposition of law relating to the subject-matter of the suit made or affirmed by one side and admitted by the other. It professes to be founded on an offer of something outside the subject-matter of the suit by defendant No. 1 which the Court holds has been converted into a promise by the acceptance of the plaintiff; that is, on a cause of action, so to speak which has come into existence since the filing of the plaint. As a general rule such causes of action cannot be taken cognizance of in the suit. One exception, if it may be so called, is where the parties come to an agreement with reference to the subject-matter of the suit and certify the same in Court. In such a case under certain limitations Section 375, Civil Procedure Code, allows the suit to be disposed of in accordance with the agreement or adjustment. It has also been held that where an agreement has actually been arrived at,

but one party unjustifiably withdraws therefrom and refuses to certify it, the Court has power to inquire and to give effect to it. Here however the parties admittedly came to no agreement, but the Court held that the offer of the defendants could not be withdrawn, and that the plaintiff's acceptance was valid, and by operation of law converted the offer into a promise which it enforced by giving a decree. The allegation of an agreement completed *in fact* appears to be a condition precedent to the Courts taking action under Section 375, Civil Procedure Code, either to give effect to it at once or to enquire whether the allegation is true or not. But there appears to be no warrant in that section or in any other of the Code of Civil Procedure for the Court to decide whether an offer *pendente lite* of something outside the subject-matter of the suit has been lawfully converted into a promise by the acceptance of the other party and to pass a decree in accordance with such promise or offer.

Again, assuming that the Court had jurisdiction to pass such a decree it was bound to enquire into defendant's objections before doing so. The procedure has been too summary, the case has been, to use the language of the Divisional Judge, " 'rushed' through without sufficient care to make all clear." Mr. Lal Chand should have been asked whether his repudiation meant that the original offer had not been made with authority, or merely that it was withdrawn and the acceptance too late.

The offer was made by Maulvi Fazl Din, a pleader, and there is nothing on the record to show whether the defendant, a *pardanashin* lady, gave him express or implied authority to make it. In the absence of such authority Maulvi Fazl Din was not empowered to do so. It is well settled law that a pleader has not power without express authority from his client to bind him by a compromise as advocates have (*Prem Sukh v. Pirthee Ram and others*, 11 Agra, 222; *Mussammatt Sirdar Begum v. Mussammatt Izzat-ul-nissa*, 11 N.-W. P., 149. See also *Asril Khadar and three others v. Audhu Set*, 11 Mad. H. O. Rep., 423, and *Jung Bahadar Singh, &c., v. Shankar Rai, &c.*, 1. L. R., XIII All., 272, F. B. Mr. Ali Hussain has quoted two old authorities, but they do not militate against the view taken in the case last cited by the Full Bench of the Allahabad Court. Nor is the reference to the judgment of the Privy Council reported in Volume II of Moore's *Indian Appeals* in point. Mr. Ali Hussain also contends that Maulvi Fazl Din's power-of-attorney

gives him such power, but the words *sakhta pardakhta sahib mausuf ka mist-i-karda-i-zat-i-khud bakar-i-nahij manzur aur kabul hoga* have reference to what goes before, viz., *waste pairwi wa jawab dehi aur wasuliat rupiya ke*, &c. They do not empower the pleader to compromise the suit or to make an offer of this kind, and we do not recollect any instance where they have been so interpreted. The point for inquiry therefore was whether the offer itself was repudiated, and if so, whether it was made on sufficient authority. It was possible that Maulvi Fazl Din, though not so empowered by the written authority, was specially instructed to make the offer, but this was a matter of evidence and required the statements of Maulvi Fazl Din and the lady to be taken in order to enable the Court to come to a right decision. The Court, however, entirely failed to question Mr. Lal Chand as to the real meaning of his objection, and to make the above inquiry if the power to make the offer was denied.

The point next to be considered is whether the offer remained open until the 24th October, when it was accepted by the plaintiff. It was informal in its language and fixed no time within which the plaintiff had the option of accepting it. The parties that very day got an adjournment of eight days for the ostensible purpose of arranging a compromise, and it may be naturally inferred that they had this offer in view when they made the application, and that the offer was to remain open for this time. On the 23rd October, however, the parties appeared and said nothing about any compromise having been effected or being under discussion. On the contrary, the defendant engaged new counsel, Mr. Lal Chand, and had fresh pleas on the merits recorded. No reservation whatever of any kind was made by either party with regard to the offer. Looking at the proceedings of that day, the only conclusion that can be arrived at is that the efforts at settlement had proved abortive. The plaintiff notified her acceptance the next day, but the defendant's counsel immediately repudiated it, stating that he had been instructed to do so by his client. Having regard to all the circumstances, we are of opinion that he was within his rights in refusing to be bound by the offer at the time the acceptance was notified. Obviously it could not remain open indefinitely, and the proceedings of the 15th October indicate that it was to hold good at the outside for the term of the adjournment, and those of the 23rd October show that the parties or at least the defendant No. 1 did not then regard it as operative. Had the plaintiff then regarded the offer a

open she would have asked that the additional pleas on the merits might not be taken down, or for further time to make up her mind. It does not appear probable, nor has it been stated that the sole difficulty of the plaintiff was that she had no duly authorized recognized agent. Had this been the case the matter would have been brought to the Court's notice and further time obtained. However this may be, the District Judge did not bestow the least thought on these matters, or on the question whether the offer was still binding, and proceeded to pass a decree in terms of the offer. In our opinion he had no power to do so, and in acting thus his proceedings were tainted with material irregularity.

However much a compromise in a case like this may be desirable, and however much we may be disposed to regret, on that account, our inability to uphold the decree, there can be no doubt that a compromise cannot be brought about in this fashion. The hastiness of the District Judge's procedure is mainly accountable for the present unsatisfactory state of the case.

The decree of the lower Courts must be set aside and the case must be enquired into on the pleadings unless the parties terminate the litigation by a fresh lawful adjustment.

We accept the appeal, reverse the decrees of the lower Courts, and return the case to the District Judge for inquiry and a fresh decision with reference to the above remarks. Court-fee on the petition of appeal will be refunded. Parties will pay their own costs up to date.

Appeal allowed.

No. 51.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

SANSAR SINGH AND ANOTHER,—(PLAINTIFFS).—
APPELLANTS,

Versus

TILOKA AND OTHERS,—(DEFENDANTS).—
RESPONDENTS.

Case No. 244 of 1896.

Document, construction of—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership—Abandonment—Estoppel—Limitation Act, 1877, 2nd Schedule, Articles 142, 144.

Plaintiffs sued for an account of the income and expenditure of a certain *kul* (or water-course) jointly excavated by the parties under an agreement in writing, dated 24th February 1873, whereby it was agreed, *inter*

APPELLATE SIDE. {

alia, that, in consideration of half the outlay in excavating the *kul*, which originally belonged to defendant and his ancestors but had fallen into disrepair and become useless, the plaintiff was to become a half-sharer therein : that thenceforth the income and expenditure on the *kul* was to be shared in the same proportion, and that in the event of a sharer failing to pay the expenses of repairs, he was to be debarred from participating in the income of that year. Defendants admitted the agreement and rendition of accounts till 1936 *Sambat*, but alleged that after that year the *kul* was stopped and litigation ensued with the owners of certain villages; that plaintiff refused to contribute towards the expenses and gave up his share; and that defendants had conducted the cases themselves and enjoyed the profits of the *kul* ever since. The District Judge dismissed the suit on the ground that plaintiff, by refusing to contribute towards the expenses of the said litigation and by his subsequent conduct, had abandoned and lost his rights in the *kul*. This decree was upheld, on appeal, by the Divisional Judge, both on the ground that plaintiff had abandoned and lost his said rights, and also that his conduct estopped him from preferring the present claim.

Plaintiff having appealed to the Chief Court, the defendants supported the decree of the lower Courts, not only on the ground of abandonment and estoppel, but also on the grounds (a) that plaintiff's rights in the *kul* could not be proved, as the written agreement of 1873 required registration, and being unregistered was inadmissible in evidence; (b) that the suit was practically one for accounts of a partnership, and therefore could not lie without a prayer for dissolution; and (c) that the failure of plaintiff to contribute towards the expenses of repairs debarred him from claiming a share of the produce for any of the years for which accounts were claimed.

Held, that the claim was one relating to profits of immovable property, and that the right in respect of which the parties were litigating and which formed the basis of the claim was one regarding such property, and that, therefore, the limitation for the possession of a share in the *kul* would be 12 years whether under Article 142 or Article 144 of the Limitation Act.

Found, upon the evidence, that there was no proof of abandonment on the part of plaintiff.

Held, further, that the written agreement of 1873 did not require registration inasmuch as, taken as a whole, it meant nothing more than that the defendant agreed to give plaintiff a half share in the *kul* provided that the latter paid a half share of the expenses of excavation, and that such a condition did not create a present right in the *kul*, but merely one that would come into existence in the event of plaintiff fulfilling the said condition.

Held, also, that even if it were conceded that a present right was created by the instrument, it was only a right in the ruined *kul*, which had at the time no value at all and certainly could not be said to have been worth Rs. 100, and that the valuable property which might come into existence if the conditions of the agreement were carried out could not be held to furnish the test of valuation.

Section 17 of the Registration Act must be strictly construed, and unless a document is clearly brought within the purview of the section, it

cannot be excluded from evidence, and, in case of doubt, the benefit must be given to the document.

Held, upon the facts of the case, that the claim was one for accounts of a co-ownership in immovable property, and not of a partnership.

Held, finally, that the agreement, rightly construed, only deprived a co-sharer of the income in case he *refused* to pay his *quota* of expenses of repairs, &c., and that mere *non-payment* did not amount to such refusal, though defendant was entitled to deduct the amount of the said expenses from plaintiff's share of the profits.

Further appeal from the order of T. Troward, Esquire, Divisional Judge, Amritsar Division, dated 27th November, 1895.

Lal Chand, for appellants.

K. P. Roy and Jaishi Ram, for respondents.

The judgment of the Court was delivered by

26th July 1898.

CHATTERJI, J.—This was a suit for an account of the income and expenditure of a *kul* or water-course jointly excavated by the parties under an agreement in writing dated 24th February 1873. The main conditions entered in that document were that in consideration of his contributing half the outlay in excavating the water-course which originally belonged to defendant No. 1 and his ancestors, but had fallen into disrepair and had become useless, the plaintiff was to become a half sharer in the *kul*, that in future the income and expenditure on the *kul* was to be shared in the same proportion, and that in case a sharer failed to pay the expenses of repairs he was to be debarred from participating in the income of that year.

Plaintiff alleged that accounts had been settled up to 1940 but not since that year, and that defendant had refused to render them as the *kul* had become very profitable.

The defendant admitted the agreement and the rendition of accounts up to 1936 *Sambat*, but alleged that after that year the *kul* was stopped and litigation ensued with the owners of certain villages, that plaintiff refused to contribute to the expenses and gave up his share, and that defendant No. 1 had conducted the cases himself and enjoyed the profits of the *kul* ever since. He also urged certain legal objections which it is unnecessary to set out here as they will be noticed further on in the judgment. Tiloka is the real defendant in the case, and the word will be understood to refer to him alone.

The District Judge of Gurdaspur who tried the suit as the Court of first instance found defendant's allegations proved in the main and that the plaintiff by refusing to contribute towards the expenses of the litigation relating to the *kul* in

1882-83 and by his subsequent conduct had abandoned his rights and lost them. He therefore dismissed the suit. His decree was upheld by the Divisional Judge, who agreed with him that abandonment on the part of the plaintiff was proved, and further that he was estopped by his conduct from preferring the present claim. The plaintiff appeals.

We have heard counsel at great length and considered the evidence, and in our opinion the finding of the Divisional Judge as to abandonment and estoppel cannot stand.

We must premise that in our opinion the claim is one relating to profits of immovable property, and the right in respect of which the parties are litigating and which forms the basis of the claim is one regarding such property. The limitation for the possession of a share in the *kul* would be 12 years whether under Article 142 or 144 of the Limitation Act. It would be only after the lapse of that period after plaintiff's dispossession or discontinuance of possession or after defendant's possession had become adverse that the plaintiff's title to the joint ownership of the *kul* would be extinguished.

Mr. Lal Chand's argument is (1) that admittedly the parties became joint owners under the agreement of 1873 and enjoyed the profits in common till 1936; (2) that in 1883 after the close of the litigation regarding the *kul* the defendant applied for mutation of names in his own favour, and, on plaintiff's objecting on the ground of his being a co-owner, conceded that he had a half share, provided he paid half the expenses of the said litigation, about Rs. 1,400; (3) that in 1886 plaintiff called as a witness by the defendant in another case asserted his right; (4) that in 1940 *Sambat* accounts were rendered; (5) that defendant wrote a letter on 15th May 1889 admitting plaintiff's right and promising to render accounts; and (6) that in 1892 when plaintiff was sued by defendant for price of grain delivered, plaintiff set up his right to the *kul*, which was found to be established by the Court, though his claim to set off the value of the grain against his dues on account of the income of the property was disallowed. He contends that plaintiff's right was nowhere definitely denied, that defendant's possession as that of a joint owner was not adverse, and that plaintiff never abandoned his rights and is not estopped from claiming his share in the *kul*.

We think the evidence and the admissions of the defendant in this and in the previous proceedings prove that though the defendant attempted to get mutation of the *kul* in his sole

name in 1883, he admitted plaintiff's half share, and only asserted that plaintiff could get it only on payment of half the expenses which he, defendant, had incurred in litigation and not otherwise. This is not a denial of plaintiff's right, but a distinct acknowledgment of it coupled with a counter claim for money. It is also proved that accounts were rendered up to 1940 *Sambat*, but it is not established that they were finally settled. The rendition of accounts shows that there was then no denial of title to the property, though the parties were not agreed about the details of the account. The exact date when this took place is not clear, but it brings us down to about 1885. This is quite sufficient to save limitation as regards the right to the property even if we are to exclude from consideration the letter of 1889 and time be held to run from the date of the quarrel relating to the account. But in fact a dispute regarding the details of the account does not amount of itself to a denial of the right to the property, and there is no clear proof of such denial until we come to the case of 1892. This suit was filed on 11th July 1893.

The plaintiff has undoubtedly shown great delay in bringing his suit, but as his right is not extinct his claim is not barred. We find no tangible proof of abandonment on his part, nor would abandonment bar his claim unless 12 years have elapsed thereafter (No. 85, *Punjab Record*, 1892, F. B.). In 1883 he asserted his claim, and again in the case of 1886 and when accounts from 1936 to 1940 were attempted to be made up. Nor do the facts establish any estoppel. We entirely disbelieve the story of his renunciation before the litigation began as well as the genuineness of the copy of the letter alleged to have been sent by Mahtaba in 1880. Plaintiff reiterated his claim several times after 1880, and the defendant said nothing about his giving up his rights in the mutation proceedings. None of the authorities quoted by respondent's counsel on the question of abandonment or estoppel is in point. Defendant knew well that plaintiff had not relinquished his right and was put to no disadvantage in consequence of any misconception of his attitude as regards the *kul* due to any act or omission of his. Defendant brought suits for *abiana* and repaired the *kul*, but these were mere acts of management and not due to plaintiff's conduct. The grounds on which the suit has been dismissed by the Divisional Judge therefore fail.

Defendant's counsel has in this Court urged other objections in support of the decree of the lower Court, and these

must be discussed. One is that the plaintiff's right to the *kul* cannot be proved, as the agreement of 1873 required registration and is inadmissible for want of it. After giving the matter our best consideration we are of opinion that the objection is not substantiated. The case is in many respects analogous to No. 16, *Punjab Record*, 1895, and the distinctions attempted to be drawn by respondent's counsel are not made out. Rationally construed no right, present or future, vested or contingent, was at once created by the document. The only words that lend any color to the respondent's contention are *hamrah Ram Singh ke sharakat moqarrir kar ke nisfi hissa ka sharik moqarrir kar lia hai*, but the first part relates to the expenditure in excavating the water-course and the second has to be read with words that follow a little later, viz., "*badin sharait, &c.*" Taken with the whole deed they mean nothing more than that the executants agreed to give Ram Singh a half share, provided he paid half the expense of digging the *kul*. As in the document in No. 16, *Punjab Record*, 1895, such a condition did not create a present right, but one that would come into existence in the event of Ram Singh fulfilling the condition of defraying half the costs of excavating the *kul*. Even if it be conceded that a present right was created it was only in the ruined *kul* which had no value at all and which certainly cannot be said to have been worth Rs. 100 at the date of the agreement. The valuable property that might come into existence if the conditions of the agreement were carried out by both parties cannot be held to furnish the test of valuation for purposes of the Registration Act. We entirely endorse Mr. Justice Rivaz's remark at page 62 of the report of the case cited above that "it was not the intention of the Registration Act that a document not on the face of it compulsorily registrable should be held hereafter to have required registration because the right dealt with, though of quite uncertain value at the date of the deed, afterwards turned out to be of value considerably in excess of Rs. 100." Further, as observed by the same learned Judge in page 63 of the report, Section 17 of the Registration Act has to be strictly construed as taken in connection with Section 49, it imposes such serious disqualifications for non-observance of registration. Unless the document is clearly brought within the purview of the section it cannot be excluded from being treated as evidence. If there is doubt the benefit must be given to it. This contention was advanced in the first Court but was rightly abandoned. It must now be overruled.

Another objection is that the suit does not lie as this is a claim for accounts of a partnership without suing for dissolution. The authorities in support of this position are beyond question, but the objection was never urged before and has no foundation in fact. The second issue drawn by the District Judge related to an objection of a wholly different kind which was never attempted to be supported. The claim was for accounts of a co-ownership in immovable property, not of a partnership, and it was never urged in the Courts below that this was a partnership. The misdescription of the claim in the judgment of the first Court appears to be the only foundation for the contention. The Divisional Judge never uses the expression. The distinction between co-ownership of property and a partnership is sometimes fine, but there is no such difficulty in defining the legal relations of the parties in this case. The defendant simply agreed to transfer a half share in his *kul* on condition of plaintiff paying half the expenses of excavating it afresh. The other conditions relate to enjoyment of the income and management. There never was any business properly so called transacted or meant to be transacted with reference to the *kul* and its income, and the parties did not become agents of each other like partners. Other incidents need not be discussed. There never was any doubt of either party being able to transfer his interest to others. The objection is wholly unfounded.

Another objection is that plaintiff not having contributed to the expenses of repairs cannot claim share of the produce for any of the years for which accounts are claimed. But the agreement only deprives a co-sharer of his share of the income in case he *refuses* to pay his *quota* of expenses of repair, &c. Non-payment is not refusal. The defendant was managing, and he is entitled to deduct the expenses. There was no plea that plaintiff refused to pay for the repairs of any particular year.

There is no other objection on respondent's part which requires separate notice.

The case will be remanded to the lower Court to decide the last three issues. Only the word partnership in issue 8 should be eliminated and the word co-ownership substituted. The remaining issues are to be understood as decided in plaintiff's favour except issue 5, as to which our finding is that there have been no accounts after 1936. Plaintiff does not claim anything before 1940 *Sambat*, but the defendant may be entitled to deductions on account of his expenses in the litigation relating to

the *kul*. The necessity for this litigation has been fully argued on both sides, and our opinion is that it is established so far as the right of irrigation from the *kul* is concerned which was understood to be in jeopardy. We express no opinion as regards the defendant's books.

As regards the limitation applicable to the present suit for accounts there was not much argument. There never was any definite refusal to render an account on the part of the defendant, and we have found that he did offer to render it about 1885. There is no express provision applicable to a suit of this kind. It is to some extent analogous to *Muhammad Habibulla Khan v. Safdar Hussain Khan*, I. L. R., VII All., 25, in which Article 120 was applied to a suit for accounts against a co-sharer. This might be held to govern the present case also. But defendant would in equity be entitled to recoup himself from plaintiff's share if upon the accounts prior to six years anything is due to him, and the whole of the accounts from 1937 must therefore be gone into. But plaintiff will not be entitled to recover anything on account of his share of the income which accrued before the last six years.

We accept the appeal and reversing the decrees of the lower Courts, return the case to the Court of first instance for a fresh decision with reference to the above remarks. Court's fee on the petition for appeal will be refunded. Other costs to be costs in the cause.

Appeal allowed : cause remanded.

No. 52.

Before Mr. Justice Frizelle, Chief Judge, and Mr. Justice Clark.

ARJAN SINGH,—(PLAINTIFF),—APPELLANT,

Versus

SOCHET SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1113 of 1897.

Punjab Land Revenue Act, 1887, Section 158 (2) (xvii), (xviii)—Suit to set aside award of arbitrators appointed by Revenue Officer in partition proceedings—Allegation of fraud, but no dispute as to title.

Plaintiffs sued to set aside an award of arbitrators appointed by a Revenue Officer, under Chapter X of the Punjab Land Revenue Act, 1887, in a dispute between the parties about partition of land. No question as to title was raised, but plaintiffs sued on the ground of fraud inasmuch as they had not been given the land which had been promised to them.

Held, that the suit would not lie, plaintiffs' only course being to press their objections before the Revenue Officer and thereafter appeal to the superior Revenue authority.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 16th June 1897.

Birch, for appellant.

Muhammad Shaffi, for respondents.

The judgment of the Court was delivered by

27th July 1898.

FRIZELLE, C. J.—We are of opinion that the lower Courts are right in holding that plaintiff's suit did not lie. It was a suit to set aside an award of arbitrators appointed by a Revenue Officer under Chapter X of the Land Revenue Act in a dispute between the parties about partition of lands. Plaintiffs sue to have the award set aside on the ground of fraud, as the land has not been given to them which they were told they would receive. The question is one clearly arising out of proceedings for partition, and it is admitted that no question as to title is raised. It is also a question as to the allotment of land on partition of a holding, and we think the suit is barred by Section 158 (2) (xvii) and (xviii) of the Land Revenue Act. The effect of admitting the suit would be to subject the proceedings of Revenue Officers in cases of partition where there is no dispute as to title to the supervision of the Civil Courts, and this we think the above mentioned clauses of Section 158 of the Land Revenue Act expressly forbid. It makes no difference in our opinion that plaintiffs sue on the ground of fraud. No exception is made on account of fraud in the clauses referred to. Plaintiffs' only course was to press their objections before the Revenue Officer and thereafter appeal to the superior Revenue authority.

The appeal is dismissed with costs.

Appeal dismissed.

No. 53.

Before Mr. Justice Frizelle, Chief Judge, and Mr. Justice Reid.

SOHNA,—(DEFENDANT),—APPELLANT,

Versus

NAND RAM,—(PLAINTIFF),—AND OTHERS,—
(DEFENDANTS),—RESPONDENTS.

Case No. 285 of 1896.

Partnership—Lien—Contract Act, 1872, Sections 60, 61, 217, 262—Set-off—Civil Procedure Code, 1882, Section 111.

The rule as to the equitable lien possessed by each partner on the partnership property cannot be applied so as to enable a managing

APPELLATE SIDE. }

partner to appropriate money due to another partner out of the assets of a firm in liquidation of a debt due from that partner to himself and entirely unconnected with the business of the firm.

Neither at common law nor in equity is there any right of set-off between parties mutually indebted in the absence of an agreement to that effect. Nor do the provisions of Section 111 of the Civil Procedure Code apply where the debt sought to be set-off was barred by limitation before the suit was filed.

Further appeal from the order of C. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 5th February 1896.

Jaishi Ram, for appellant.

Gouldsbury, for respondent.

The judgment of the Court was delivered by

REID, J.—The first and second pleas in appeal have no 10th Augt. 1898.
force.

The suit was not for dissolution of partnership, but for money alleged to be due to the plaintiff by the answering defendant for his share of the principal and profits, after the partnership had been dissolved. The third and fourth pleas are also without force. We see no reason to differ from the concurrent findings of the Courts below, that the conclusions as to profits arrived at by the Commissioner were correct. He excluded from profits the sums expended in purchase of drugs and payment of Government demands for the lease. The partnership capital was presumably raised to defray these initial expenses, and the appellant has failed to show that this was not the case.

The fifth ground was not argued, while the sixth traverses a finding of fact on which the Courts below have concurred, and on which we see no reason to differ from them.

The evidence on which the seventh ground of appeal is based was not believed by the Courts below, and we see no reason for believing it. The two witnesses relied on by the appellant told a most improbable story, and we concur in the reasons given by the lower Appellate Court for not accepting it. In support of the eighth ground it has been contended that the appellant having money of the respondent-plaintiff in his hands was entitled to appropriate it to the liquidation of a debt due by the plaintiff to him.

Reliance was placed on Sections 60 and 61 of the Contract Act, which are obviously inapplicable. There was no

payment by the plaintiff. Section 262 of the Contract Act, also relied on, is inapplicable. The rule therein contained is not that a partner may liquidate a private debt to himself by another partner out of the latter's share in the assets. That is not the nature of a partner's lien. In Lindley on *Partnership*, Ed. 9, the law is thus laid down: "In order to discharge himself from the liabilities to which a person may be subject as partner every partner has a right to have the property of the partner applied in payment of the debts and liabilities of the firm. And, in order to secure a proper division of the surplus assets, he has a right to have whatever may be due to the firm from his co-partners, as members thereof, deducted from what would otherwise be payable to them in respect of their shares in the partnership. In other words, each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm, and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners, to the firm."

This rule obviously cannot be applied, as the pleader for the appellant asks us to apply it, so as to enable a managing partner to appropriate money, due to another partner out of the assets of the firm, in liquidation of a debt due from that partner to himself and entirely unconnected with the business of the firm.

The suggestion that the appellant as a partner was an agent of the plaintiff and as such had a lien under Section 217 of the Contract Act is met *in limine* by the fatal objection that the money alleged to be due was not alleged, much less proved, to be due in respect of the partnership business. Reliance was also placed on a right to set-off the debt alleged to be due against the claim.

We have already found that so far as the seventh ground of appeal concerns set-off the evidence relied on must be rejected, and the appellant has failed to prove any agreement to set-off the one claim against the other.

In Leake on *Contracts*, Ed. 3, it is laid down that by common law there is no right of set-off between parties mutually indebted in the absence of an agreement to that effect, and that the rule of equity is the same, except in special circumstances, which do not arise here.

None of the provisions of the Contract Law dealing with set-off or lien apply to this case, and the debt sought to be set-off was admittedly barred by limitation, if not liquidated before this suit was filed, so that the provisions of Section 111 of the Code of Civil Procedure do not apply. The last ground taken in appeal was not pressed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 54.

Before Mr. Justice Reid.

AMIN CHAND,—(OBJECTOR),—APPELLANT,

Versus

PHAGU MAL,—(OPPOSITE PARTY),—RESPONDENT.

} APPELLATE SIDE.

Case No. 731 of 1898.

Guardians and Wards Act, 1890, Sections 3, 7—"Will or other instrument"—Nuncupative will—Appointment of minor's heir as guardian of property.

Held, that the provisions of Section 7 of the Guardians and Wards Act, 1890, do not apply to nuncupative wills.

Held, further, that inasmuch as a minor's heir is peculiarly interested in the good management of the property to which he hopes to succeed, there is no objection to the appointment of such a person as guardian of the minor's property as distinct from the minor's person.

First appeal from the order of Muhammad Sarfraz Khan, Additional District Judge, Lahore, dated 10th May 1898.

Sant Ram, for appellant.

Gobind Ram, for respondent.

The judgment of the Court was as follows:—

REID, J.—The construction placed by the Court below on 13th Augt. 1898. the third clause of Section 7 of the Guardians and Wards Act (VIII of 1890) is reasonable, and is supported by the history of the legislation on the subject.

The words in Act XI of 1858, corresponding to "will or other instrument" in the clause in question, are "will or deed," and it is significant that in Sections 5, 7 and 39 of the present Act the words "will or other instrument" appear, while throughout the old Act the words used were "will or deed." I am therefore of opinion that the intention of the legislature was to exclude nuncupative wills, and that Section 7 applies only to a documentary will.

In this view it is unnecessary to consider whether the evidence as to the nuncupative will set up is true or false, although I concur with the Court below in the opinion that the failure to mention the alleged will for more than two months after the appellant's objections were filed, although there had been two intermediate proceedings, is suspicious.

The objection based on No. 135, *Punjab Record*, 1893, that the respondent did not name any person as guardian, has no force, the application being for the appointment of the respondent or some other person, and this position was not abandoned, although the respondent would have preferred some one, other than himself, being appointed.

Reliance is placed, for the appellant, on the dictum in No. 137, *Punjab Record*, 1893, that it is obviously objectionable that a minor should be made the ward of his own heir, and it is contended that the word "ward" was used in this ruling, as defined in Section 3 of the Act, with reference to both person and property. I cannot allow this contention. There is no obvious danger to property when it is managed by the heir, whatever danger there may be to a child in the guardianship of the person who would profit by his death. The heir is peculiarly interested in the good management of the property to which he hopes to succeed.

The allegation that the respondent is personally unfit for the management of the minor's property has no force.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 55.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

MUNICIPAL COMMITTEE, UMBALLA,—(DEFENDANT),—
APPELLANT,

Versus

BHAGWAN DAS,—(PLAINTIFF),—RESPONDENT.

CASE No. 1 of 1898.

Punjab Courts Act, 1884, Section 67—Hearing fixed for gazetted holiday—Obligation of party to appear on such day.

Proceedings held in a Civil Court on a holiday are not necessarily a nullity on that account, but if the Court wishes to hear a case on a gazetted civil holiday, it must do so with the consent of the parties concerned and cannot make them appear before itself without such consent, the exemption from attendance in Court on a gazetted holiday

REFERENCE SIDE. {

being a privilege conferred by law, of which no Court can of its own motion deprive the person concerned in the absence of any waiver of such privilege on the part of the latter. Nor in this respect is there any distinction between one class of gazetted holidays and another class.

*Case referred by W. A. Harris, Esquire, Divisional Judge,
Umballa Division, by order, dated 23rd June 1898.*

The judgment of the Court was as follows—

CHATTERJI, J.—The material facts are briefly these: The 10th Augt. 1898. hearing of the appeal, *Bhagwan Das v. The Municipal Committee of Umtalla*, in the Divisional Judge's Court was fixed for the 22nd June 1898, but by order of the Judge, Mr. W. A. Harris, the date was accelerated to the 19th May which was one of the gazetted holidays for the Civil Courts for *Muharram*. The respondent in acknowledging service pointed out that his pleader might not attend on this account and asked for a fresh date. This prayer was not acceded to, with the result that there was no appearance for the respondent on the 19th, and the appeal was decided against him *ex-parte*.

The respondent then applied for a rehearing on the ground that he was not bound to attend on a gazetted holiday. The Divisional Judge has referred the case to us under Section 617, Civil Procedure Code, for our opinion whether attendance was obligatory on such a day in consequence of his order, or whether the Court was powerless to proceed and bound to adjourn the hearing. He thinks there are some holidays on which Christians might well object to attend such as Sunday, Christmas Day and Good Friday, others on which attendance would be equally obnoxious to Hindus or Muham-madans, but that if the hearing is fixed for any other civil holiday besides these, the suitors would be bound to attend.

We are of opinion that it is an irregularity to hold Court on a day which is a gazetted holiday without the consent of parties, and that attendance on such a day is not obligatory at least when such consent has not been previously given. This has been ruled in numerous instances, *Punjab Record*, No. 86 of 1890, quoted by the Divisional Judge; Civil Appeal No. 1384 of 1889 (unpublished); *Ram Das Chakrabati v. The Official Liquidator of the Cotton Ginning Company, Limited, Cawnpore*, I. L. R., IX All., 366; *Queen v. Hargobind Datta, Sirkar, &c.*, VIII B. L. R., App. 12; see also as to an analagous point *Haro Jemdar and others J. Ds. v. Jadul Chunder Holdar*, D. H. III W. R., Misc. 24. Section I, para. 2 of the 2nd Volume of the Rules and Orders issued by this Court shows by what authority

the civil holidays are prescribed. The list of these holidays is framed by this Court with the sanction of the Local Government under Section 67 of the Punjab Courts Act. That section is practically worded in the same way as Section 17 of the old Bengal Civil Courts Act, VI of 1871, the only difference being that the word "close" is not found in the Punjab Act, which is unimportant for purposes of the present discussion (see also Section 15 of present Bengal and N.-W. P. Courts Act, XII of 1887). The learned Chief Justice observed in the Allahabad case cited above that the section in the earlier Bengal Act was enacted in the interests of Judges and officials of the Courts as well as in those of the pleaders, suitors and witnesses whose religious observances might interfere with their attendance in Court on particular days. The same observations apply to Section 67 of the Punjab Courts Act. The duty of framing the list is obligatory by statute on the superior Court, and the intention of Legislature clearly is that the holidays on the list should be observed by the Courts subordinate to such Court. The imposition of the duty would be unmeaning if this is not meant, and if the subordinate Courts can of their own will compel suitors to attend before them on holidays entered on the list. For special reasons they may hold Court on such days, but the suitors can only be made to attend if they consent—and not otherwise.

The distinction suggested by the Divisional Judge does not appear to be supported by any authority, nor has the Judge quoted any. In England a distinction is made between a Sunday and an ordinary holiday, the former being a *dies non-juridicus*, but this has its foundation in the law of the country, while it is doubtful whether it obtains in India at least in the *mojassil*. In England an arrest under a civil process is void on a Sunday (Daniell's *Chancery Practice*, 6th Edition, page 886), but Section 336, Civil Procedure Code, makes no such exception, see also *Ummto Ram Chatterji v. Protap Chunder Shiromonee*, XVI, W. R., 230). This is, however, by the way and it is not necessary to decide the point. What we mean to point out is that the law does not seem to recognize any distinction between one class of holiday and another. All appear to be put on the same footing. The assumption by a subordinate Court of the power of deciding what holidays are obligatory on the conscience of people of a particular religious denomination has no sanction in law and might lead to mischievous results. Moreover if the power were conceded the Court might, if so disposed, by

adopting the process of discrimination pointed out by Divisional Judge hold Court on almost every sanctioned holiday and thereby cause great inconvenience to its Officials, to the suitors and to legal practitioners. All this is meant to be avoided by the list being prepared by a central authority after careful consideration.

Proceeding held in a Civil Court on a holiday are not necessarily a nullity on that account, but if the Court wishes to hear a case on a gazetted civil holiday, it must do so with the consent of the parties concerned; and cannot make them appear before itself without such consent. Once the consent is given the Court's proceedings become legal and cannot be impeached. Nor can they be impeached except by the parties and only on the above grounds. But the exemption from attendance in Court on a gazetted holiday is a privilege conferred by law, and unless it has been waived by the person concerned, no Court can of its own motion deprive him of it.

In this case it is admitted that the respondent's consent to attend on 19th May 1898 was not obtained when the date was fixed, and that on notice being served on him he objected and asked for a fresh date. Under the circumstances the act of the Divisional Judge was clearly illegal, and the respondent cannot be punished for his default. We hold, therefore, that the *ex-parte* order must be set aside and the appeal heard afresh by the Divisional Judge, and we direct the Judge to act accordingly.

No costs were incurred in this Court, as neither party entered appearance.

No. 56.

Before Mr. Justice Reid and Mr. Justice Clark.

SANT RAM AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

MUSSAMMAT MOHAN DEVI,—(PLAINTIFF),—
RESPONDENT.

} APPELLATE SIDE.

Case No. 359 of 1897.

Order of remand under Section 562, Civil Procedure Code, 1882—Erroneous order—Powers and duties of Chief Court when hearing appeal from such order.

Held, that when a certain fact is the basis of a suit and there is no suggestion that the inquiry into that fact by the first Court has been insufficient or imperfect, and the lower Appellate Court, differing from the

Court of first instance as to the existence of that fact, has remanded the suit under Section 562 of the Code of Civil Procedure, the Chief Court, when hearing an appeal from the order of remand, is entitled, when it finds that the order of remand should not have been made under that section, to itself consider and decide upon the truth of such fact, and is not bound to return the appeal to the lower Appellate Court for decision thereon.

Miscellaneous appeal from the order of Sardar Muhammad Hayat Khan, C.S.I., Divisional Judge, Amritsar Division, dated 8th February 1897.

Madan Gopal and K. P. Roy, for appellants.

Jaishi Ram, for respondents.

The facts of the case are sufficiently stated in the judgment of the Court delivered by

9th May 1898.

REID, J.—In addition to the grounds of appeal already filed counsel for the appellants is allowed to urge the following, filed in a memorandum of appeal on behalf of one of the appellants, which is barred by limitation :—

- (1) It is proved that defendant No. 2 has ceased to be a partner, so plaintiff cannot sue him.
- (2) The plaintiff as defendant has admitted the same in her written statement of the 18th January 1895, *in re* Sarab Dial v. Sant Ram and Mussammat Mohan Devi, defendants.

The facts have been stated at great length in the judgments of the Courts below and need not be recapitulated.

The Court of first instance found that the respondent was a partner of the firm, of which her late husband was a partner, after his death, until at any rate the insolvency of the firm a short time before suit. Amar Das, respondent's husband, admittedly died more than three years before suit.

The lower Appellate Court found that the respondent was never a partner, and that her suit for an account of the profits of the partnership dissolved by the death of her husband was barred by limitation under Article 106 of Schedule II, Act XV of 1877, but that her suit might be converted into a suit for her share of sums realized by the firm from debtors within three years of suit.

The suit was then remanded to the Court of first instance, under Section 562 of the Code of Civil Procedure, for inquiry into the amount of the share of such sums due to the respondent.

The pleader for the respondent contends that if this Court decides that the remand should not have been made under Section 562, it must return the appeal to the lower Appellate Court, and cannot decide whether, as a fact, the respondent was or was not a partner.

It is further contended that the Court of first instance decided the suit on two grounds : (1) that the suit as filed was barred by limitation ; (2) that the respondent, being a partner, could not sue for sums received by the firm since the death of her husband, and it is contended that the second is not a preliminary point.

Reliance is placed on No. 46, *Punjab Record*, 1885, and an unreported ruling of this Court in miscellaneous appeal No. 318 of 1895. In those cases it was held that the lower Appellate Court had wrongly remanded the suit under Section 562, the point not being preliminary, and that he should dispose of all the issues before him, and if necessary remand under Section 566. In the case before us it is admitted that the suit must fail if the Court of first instance was right in holding that the respondent was a partner after the death of her husband, and no other issue can arise. The only result of adopting the course suggested by the pleader for the respondent would be that after considerable time and trouble had been expended on taking accounts the appellants would appeal to this Court again, on the ground now taken, that the respondent was, as a fact, their partner. We are unable to appreciate the expediency of adopting a course so obviously calculated to waste time. There is no case here of a remand under Section 566, and it has not been suggested that the inquiry into the existence of the partnership was imperfect.

In *Sayad Mazhar Hussain v. Mussammat Bodha Bibi*, *I. L. R., XVII All. (P. C.)*, 112, their Lordships of the Privy Council held that in a suit based on a will which had been dismissed by the first Court on the ground that the will was not proved, the Appellate Court, which held that the will was proved, should have proceeded under Section 565 and decided the issues ancillary to that which concerned the genuineness of the will on the evidence on the record. The report of the case is simply to the effect that their Lordships granted special leave to appeal and up to the last number of the *I. L. R., All.*, no further report has appeared. Their Lordships held that the order under Section 562 was final so far as to allow an appeal to their Board.

The question raised before us does not appear to have been raised in the cases before this Court above referred to. No. 6, *Punjab Record*, 1892; *Abraham Khan v. Faiz-un-nissa*, *I. L. R.*, *XVII Calc.*, 168; *Raisiugji v. Balvantrao*, *I. L. R.*, *XI Bom.*, 663; and *Amma v. Kunhanni*, *I. L. R.*, *IX Mad.*, 355, are also relied on for the respondent. Of these the *Punjab Record* case and the Calcutta case are alone in point. The former is based on *Sohan Lal v. Aziz-un-nissa Begam*, *I. L. R.*, *VII All.*, 136, in which Mahmud, J., says: "It is to be observed that the case "from which this appeal has arisen is one which can come "up before us only in second appeal, and we are of opinion "that the circumstance that this appeal is a first appeal "from order under the provisions of clause (28), Section 588 "of the Code would not alter the nature of the powers to be "exercised by us in second appeals under Section 584." This clearly distinguishes the powers of the Allahabad, and also of the Calcutta Court, from the powers of this Court, which can decide a further appeal on the facts and is not bound by the finding of fact of the lower Appellate Court, as the other High Courts are under the Code of Civil Procedure. Rivaz, J., who decided No. 6, *Punjab Record*, 1892, was sitting alone, and his pecuniary jurisdiction in appeals from decrees passed in suits was limited to Rs. 100. From the record it appears that the value of the subject-matter of the appeal before him was Rs. 2,500. Our pecuniary jurisdiction is unlimited and, in our opinion, we can, and should, decide the question whether or not the respondent was, as a fact, a partner in the firm after the death of her husband. The reason for the attitude adopted by her is obvious. On the death of her husband the firm was prosperous and possessed considerable assets. It has since become insolvent. As representing her husband she would be entitled, according to previous statements by her, or on her behalf, to Rs. 50,000 or Rs. 60,000; as a partner she would be entitled to nothing, or, at any rate, to very little, and that little could not be recovered in this suit. For the reasons given by the Court of first instance we have no hesitation in holding that she succeeded her husband as a partner in the firm. She is not a *pardha nashin* lady, in the sense in which Muhammadan and some other ladies are *pardah nashin*. It is a matter of every day experience that Khatri ladies take a considerable share in the management of business conducted by their families, and we see no reason for doubting that she went to the registration office and transacted the other business which the witnesses for the appellants depose that she transacted, or for dis-

believing the evidence of Ghulam Mohi-ud-din and of Radha Ram and Jagan Nath. They were not shaken in cross-examination, and no adequate motive for their giving false evidence is suggested.

The course adopted by the Court of first instance, on having reason to suspect that the respondent was a partner in the firm, was justified, and there can be little doubt that the opinion formed by that Court as to the objects and motives of the parties to this suit is well founded.

We decree the appeal and restore the decree of the Court of first instance, but, having regard to the conduct of the appellants, we leave the parties to pay their own costs of this and of the lower appellate Court.

Appeal allowed.

No. 57.

Before Mr. Justice Chatterji and Mr. Justice Clark.

BUDH SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MUSSAMMAT DHAN KAUR AND ANOTHER,—
(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 2 of 1896.

Custom—Alienation—Suit by remote reversioner in presence of nearer reversioner—Speculative suit.—

The rule that where a nearer reversioner is precluded from suing to contest an alienation, or colludes with the alienor, a more remote reversioner can sue, has no application to a purely speculative claim with only the remotest chance of ever having any practical effect.

In the present case the plaintiffs, according to the genealogical table, had only a very remote chance of succeeding to a small portion of the estate in dispute.

Held, that plaintiffs were not entitled to sue for a declaration that an alienation should not affect their reversionary rights.

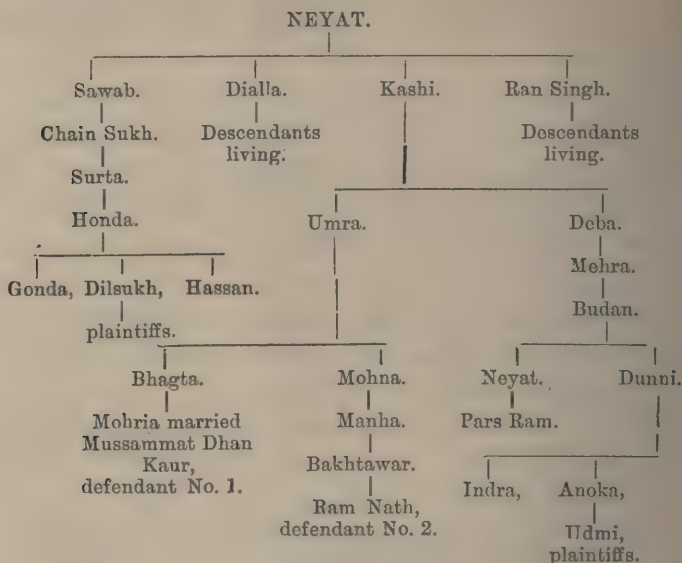
No. 7, *Punjab Record*, 1893, and No. 81, *Punjab Record*, 1896, followed. Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Delhi Division, dated 7th October 1895.

A. L. Roy, for appellants.

Duni Chand, for respondents.

The facts of the case and the relationship of the parties sufficiently appear from the judgment of the Court delivered by

18th June 1898. CLARK, J.—The genealogical tree as far as it is material, is as follows :—



Plaintiffs sued for a decree declaring that an alienation by mutation on 5th May 1893 by Mussammat Dhan Kaur in favour of Ram Nath should not affect their reversionary rights. The real question was whether Mohria had adopted Ram Nath, and the prior question arises whether plaintiffs are entitled to sue.

A reference to the genealogical tree shows that plaintiffs have only the very remotest chance of succeeding to a small portion of Mohria's estate.

Mussammat Dhan Kaur is now dead, and if Ram Nath was not adopted then Bakhtawar is his heir, and Ram Nath is Bakhtawar's heir. Even if they died out, the descendants of Deba would all exclude plaintiff.

It has been held that where a nearer reversioner is precluded from suing, or colludes with the alienor, a more remote reversioner can sue, but this is not the case here. This is a purely speculative claim, with only the remotest chance of ever having any practical effect. We think that plaintiff is not entitled to sue, following *Punjab Record*, No. 81 of 1896, and No. 7 of 1893. It was argued that Mohria was Bhagta's *pichlag*, and that the estate was not inherited from Bhagta, but given to him by all the collaterals, and that Mohria's line having come to an end, the estate reverted to the donors.

This is an entirely new case and we refuse to listen to it at this stage.

The appeal is dismissed with costs.

Appeal dismissed.

No. 58.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

JAISUKH,—(DEFENDANT),—APPELLANT,

Versus

DINA NATH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 90 of 1898.

Civil Procedure Code, 1882, Sections 130, 136, 138, 139—Failure to comply with order directing defendant to produce documents by specified date—Defence struck out and case heard ex-parte.

Plaintiff's plaint was filed in the District Court on the 23rd December 1895, and the 9th February 1896 was fixed for defendant's appearance. The latter appeared on the said date, but the case was put off to the 24th February on which date defendant filed his defence. After several adjournments, issues were drawn and the parties examined on the 2nd April, and at the close of the day's proceedings the District Judge recorded an order to the following effect: "Case for evidence on the 19th and 20th May. Defendant must file the documents he has in his possession and copy of his account-book by 5th April." On all the adjourned dates, except one, defendant was present in person in Court.

On the 2nd April plaintiff had a notice served on defendant for the production of his books and certain letters, and on the 9th April defendant gave plaintiff notice under Section 132 of the Civil Procedure Code, offering inspection at a certain place on the 19th. On the 21st April, after inspection by the plaintiff, defendant applied for leave to remove his books to his shop, and on the following day the District Judge gave the required permission. Plaintiff called defendant as his witness for the 19th May, but the notice was returned unserved with the endorsement that defendant had gone away. Therefore plaintiff's pleader complained that defendant had kept out of the way to evade service, and had not complied with the order of the 2nd April. The Court was, therefore, asked to proceed under Section 136 of the Code, by striking out defendant's defence, and to decide the case *ex-parte*. The Court held that the said order was one under Section 130 of the Code, struck out the defence under Section 136, and after taking some evidence for the plaintiff, decreed the claim in full. The decree having been upheld by the Divisional Court on appeal, defendant appealed to the Chief Court.

Held, that the lower Courts had erred in treating the order of the 2nd April as one passed under Section 130 of the Code, and that the District Court was not justified by defendant's non-compliance with the said order in striking out the defence and deciding the case *ex-parte*.

Section 130 of the Code does not apply to a general direction, without any particular object in view, to a party to produce all documents in his possession by a certain date, and (*semble*) the order therein referred to is meant to be served on the party to whom it is given, and not merely to be verbally announced, so that compliance would depend on his memory or his understanding of it.

Held, further, that even if the order in question had been one under Section 130, it could not be legally given in respect of the copy of defendant's accounts as they were not in existence, and therefore not in the possession or power of defendant, when it was passed.

Section 136 of the Code requires to be worked with caution and should be made use of only as a last resort, and it is always proper to make the order a conditional one and to grant a little further time for compliance.

Further appeal from the order of F. A. Robertson, Esquire, Divisional Judge, Umballa Division, dated 12th November 1897.

Madan Gopal, for appellant.

J. C. Bose, for respondent.

The judgment of the Court was delivered by

12th July 1898.

CHATTERJI, J.—The material facts of this case are these: The plaintiff's plaint was filed in the Umballa Court on 23rd December 1895 and the 9th February 1896 was fixed for the defendant's appearance. He appeared and the case was put off to the 24th on which date he filed his defence. After several more adjournments the issues were drawn and the parties examined in detail as ordered by this Court on the 2nd April, and at the close of the day's proceedings the District Judge, Mr. G. Lewis, recorded an order to this effect: "Case for evidence for the 19th and 20th May. Defendant must file the documents he has in his possession and copy of his account-book by 5th April." On all the adjourned dates except one the defendant was present in person in Court.

On 2nd April plaintiff had a notice served on defendant for the production of his books and certain letters. On 9th April defendant gave plaintiff notice under Section 132, Civil Procedure Code, offering inspection at the *arzinavis'* quarters near the Court-house on the 19th. On 21st April apparently after some kind of inspection by the plaintiff defendant applied for leave to take away his books to his shop which the District Judge permitted on the following day.

Plaintiff called defendant as his witness for the 19th May, but the notice was returned unserved with the endorsement that the defendant had gone to Saharanpur. On the day of hearing plaintiff's pleader Lala Dwarka Das complained

to the Court that defendant had kept out of the way in order to avoid service and brought to the Court's notice that he had not complied with the order to produce documents passed on the 2nd April. He asked the Court to proceed against defendant under Section 136, Civil Procedure Code, by striking out his defence and to decide the suit *ex-parte*. Gopal Das, pleader for the defendant, pointed out that the Court's order of the 2nd April was not one under Section 130, Civil Procedure Code, but intended merely to facilitate the proceedings in the case. The Court, however, ruled that it was one falling under Section 130 and struck out the defence under Section 136 and proceeded to hear the case *ex-parte*. After taking some evidence for the plaintiff it decreed the claim in full. This decree was upheld on appeal by the Divisional Judge.

In further appeal the defendant contends that the procedure of the lower Courts was erroneous in law, unwarranted by the facts of the case and harsh and oppressive. After hearing counsel on both sides, we are of opinion that these grounds have been substantially made out.

We are disposed to think that the order of Mr. Lewis was not an order falling within the provisions of Section 130, Civil Procedure Code. That section contemplates the production of documents relating to any matter in question in the suit before the Court, and only such of them as the Court considers proper and it leaves the Court full discretion to deal with such documents when produced in such manner as appears just. This would seem to imply that the Court of itself, or at the instance of a party to the suit, has directed its attention to a particular matter and to the documents bearing on such matter at the time the order is passed, and that it has consciously determined before giving the order what documents of the nature above described should be produced. The section does not seem to apply to a general direction, without any particular object in view, to a party to produce all documents in his possession by a certain date. Under Section 138 the parties to a suit are bound to have in readiness at the first hearing of the suit, to be produced when called for by the Court, all the documentary evidence in their possession or power on which they intend to rely, or the production of which has already been ordered by the Court. The penalty for non-compliance with the section is provided in Section 139, and is merely the exclusion of all documents not so produced from being received in evidence without the special leave of the

Court on good cause for non-production being shown. It is not that the defence is to be struck out, or the case decided *ex-parte*. We consider Mr. Lewis simply intended to call for the documents and gave defendant time to produce them by the 5th April as they were evidently not ready on the 2nd when the issues were drawn. It is also probable that the order spoken of in Section 130 is one meant to be served on the party to whom it is given and not merely to be verbally announced, so that compliance would depend on his memory or his understanding of it, *Doorgamonsee Dossee v. Benode Monsee Dossee, W. R.*, 1864, page 164. At any rate there can be no doubt of the propriety of serving such an order in writing. Lastly as pointed out in No. 59, *Punjab Record*, 1892, the order could not be legally given in respect of the copy of defendant's accounts as they were not in existence and therefore not in the possession or power of the defendant when it was passed. We therefore think the first Court was wrong in treating Mr. Lewis's order as one passed under Section 130, and we have little doubt that Mr. Lewis never meant it to be so.

Further even if the order was one under Section 130 the procedure of the Court appears to have been most hasty and harsh, and not at all called for by the circumstances of the case. We can find no substantial foundation for the plaintiff's pleader's complaint that the defendant had intentionally avoided service of summons as a witness. He had repeatedly appeared in person before, and this ought to have been borne in mind. Again he had produced his books in original for the inspection of the plaintiff in pursuance of a notice under Section 131, Civil Procedure Code, given by the latter and had kept them in Court for three days. He had taken them back with the Court's knowledge and permission. No reference was made to this fact by the plaintiff or the Court when the order under Section 136 was passed.

Section 136 requires to be worked with caution and should be made use of only as a last resort. The practice of the English Courts is, and it is always proper, to make the order a conditional one and to grant a little further time for compliance. *Twycroft v. Grant, W. N.* 75, page 229; *Daniell's Chancery Practice*, 6th Edition, page 1851; *Khajah Assenoolla v. Khajah Abdool Aziz, I. L. R.*, IX *Calc.*, 923. In this instance the section has been applied absolutely without any justification even if the application was legal which it was not,

We accept the appeal, and, setting aside the decrees of the Courts below, remand the case to the Court of first instance to be heard and decided in accordance with law after taking all evidence produced by the parties. The respondent will pay all costs up to date.

Appeal allowed.

No. 59.

Before Mr. Justice Reid.

DAULAT RAM,—(DEFENDANT),—PETITIONER,

Versus

RUP LAL,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Case No. 680 of 1898.

Civil Procedure Code, 1882, Sections 336, 337 A—Arrest and imprisonment in execution of decree—Subsequent application stating judgment-debtor's intention to apply to be declared an insolvent—Rejection of application—Illegal confinement—Duress.

Where a debtor, on being arrested and brought before a Court in execution of a decree, expresses his intention to apply to be declared an insolvent, under Section 336 of the Civil Procedure Code, the Court must release him on his furnishing security to appear when called upon and to apply within one month under Section 344 of the Code.

Where, however, the debtor did not apply under Section 336 on being first brought before the Court, but made such application after proceedings under Section 337 A had terminated, and it did not appear that he had furnished the requisite security,

Held, that, without holding that an application under Section 336 cannot under any circumstances be made after proceedings under Section 337 A, the Court in the present case was not bound to release the petitioner, and that his confinement in jail was not illegal by reason of such application.

Held, therefore, that a mortgage and bond executed by such debtor while in jail, for the purpose of securing his release were not void on the ground of duress.

Petition for revision of the order of R. L. Harris, Esquire, Divisional Judge, Derajat Division, dated 9th February 1898.

Ganpat Rai, for petitioner.

Krishen Singh, for respondent.

The facts of the case appear from the judgment delivered by

REID, J.—A decree for Rs. 700 was passed by a Munsif 4th Augt. 1898. against the petitioner and his father on a joint promissory note. On the 20th March 1891, the decree-holder applied for

the arrest of the petitioner, in execution, and a warrant returnable on the 4th July was issued.

On the 1st July the petitioner applied to the Subordinate Judge, with powers of a District Judge, to be admitted to bail, the warrant containing a condition that no bail was to be taken.

The Subordinate Judge transferred the proceedings to his Court and passed an order for the release of the petitioner on his own recognisances.

On the 4th July the Court found that the petitioner had concealed property to defeat execution, and committed him to jail under Section 337 A 2 (b) of the Code of Civil Procedure. On the same day the petitioner filed a petition stating his intention to apply to be declared an insolvent. This petition was apparently under Section 336 of the Code. The Court passed an order thereon declining to release the petitioner, on the ground that the previous order under Section 337 was not affected by the application.

On the 22nd July the petitioner executed the mortgage in suit for Rs. 300 and a bond for Rs. 400 and was released from jail.

On the 25th August he applied to be declared an insolvent.

The first question is whether the petitioner was in illegal confinement on the 22nd July.

Where a debtor, on being arrested and brought before a Court, expresses his intention to apply to be declared an insolvent, under Section 336, the Court must release him on his furnishing security to appear when called upon and to apply within one month under Section 344, but it does not appear that the petitioner furnished such security, while he certainly did not apply under Section 336 on being first brought before the Court. On the contrary, he did not apply until proceedings under Section 337 had terminated. Without holding that an application under Section 336 cannot under any circumstances be made after proceedings under Section 337, I do not think that the Court was bound to release the petitioner and that his confinement in jail was illegal, under the circumstances above stated. Counsel for the petitioner relies on a passage in the judgment of their Lordships of the Privy Council in *Moung Shoa v. At v. Ko Byaw*, 1 L. R., 1 Cal., 330, to the effect that, although lawful

imprisonment for a civil debt is not coercion, imprisonment in a country, where there is no settled system of law or procedure, and where the Judge is invested with arbitrary powers, is duress of a wholly different kind, as the prisoner neither knows what will be the length of his punishment, nor what amount of pain or misery he may be put to. This reasoning may have applied to Burmah in 1874, but certainly could not apply to this Province in 1891. The other authorities cited, *Marriot v. Hampton*, 2 Smith's *Leading Cases*, Edition V, page 356, and *Banda Ali v. Banspat Singh*, I. L. R., IV All., 352, are not in point. In the former it was held that money afterwards discovered not to have been due, paid under compulsion of legal process, could not be recovered in an action for money had and received, and in the latter it was held that a bond for a sum decreed by a Court without jurisdiction was voidable, as executed under duress.

Here there is no suggestion that the Court which passed the decree did so without jurisdiction.

The application fails, and is dismissed with costs.

Application dismissed.

No. 60.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

FATEH ALI SHAH AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

MIRAN BAKHSH,—(PLAINTIFF),—RESPONDENT.

Case No. 959 of 1897.

} APPELLATE SIDE.

Promissory note—Consideration—Inequitable bargain—Burden of proof.

In a suit by plaintiff to recover from defendant No. I and his wife a sum of Rs. 10,000 principal and Rs. 2,400 interest on a promissory note purporting to be executed by both defendants on the 29th November 1895, payable six months after date, defendant No. I while admitting execution, pleaded that after he had attained majority his extravagance had necessitated his estate being again put under the Court of Wards; that after the time the debt was contracted he was living on a small monthly allowance of Rs. 160, which was inadequate for his wants; that he cast about for a loan, and that plaintiff, whom he described as an astute lawyer's clerk, caught him in his meshes and got him to execute the note for a grossly inadequate consideration. It was, therefore, urged on his behalf that the doctrine of the English Court of Chancery in the case of expectant heirs and necessitous persons should be applied, and a decree passed merely for what he had actually received, with reasonable interest

thereon. It appeared that defendant No. I was a well grown and mature man of about thirty, who had already succeeded to a large estate, and that, though addicted to extravagance and debauchery, he was not a person of weak mental capacity, or in any state of mental or bodily distress, or such necessity as made him incapable of weighing the consequences of the transaction into which he was entering with the plaintiff with whom he had had no previous dealings.

Held, that under the above circumstances defendant No. I could not be placed in the category of those incapable of protecting themselves, and that the case must, therefore, be treated as an ordinary case of debtor and creditor, the *onus* of proof of all the disputed facts being, on the pleadings, upon defendant No. I.

Held, further, that there is an equity founded upon the gross inadequacy of consideration, but it can only be when the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition.

Found, upon the evidence, that defendant No. I has failed to prove his allegations.

A plea by defendant No. II that she had never executed the promissory note or put her mark on it, or received consideration in respect thereof, *found*, not established.

First appeal from the order of Pandit Hari Kishen Kaul, District Judge, Lahore, dated 12th July 1897.

Madan Gopal, for appellants.

Browne, for respondent.

The judgment of the Court was delivered by

3rd July 1898.

CHATTERJI, J.—This is a suit by the plaintiff, a native of Lahore, to recover from the defendant, Fateh Ali Shah, a *rais* of Multan, and his wife, Mussammatt Lalan Bibi, the sum of Rs. 10,000 principal and Rs. 2,400 interest, on a promissory note purporting to be executed by both on 29th November 1895, payable six months after date. Before the execution of this note the first defendant wrote another payable on demand in plaintiff's favour on 28th October 1895 for Rs. 6,000, the consideration for which is alleged to have been jewels, specified in a receipt, page iv, worth Rs. 5,000, and a cheque on the Punjab Banking Company for Rs. 1,000. This note with Rs. 3,000 worth of jewellery, as per detail in receipt, page viii, and another cheque for Rs. 1,000 on the same Bank is said to form the consideration for the note sued on.

The first defendant admits the execution of the promissory note of 29th November, as well as the previous one of 28th October, and the receipts above mentioned, and the letters and other documents produced by the plaintiff in

support of his claim, but alleges that on the first occasion he received jewels worth Rs. 1,000 only instead of Rs. 5,000, and on the second occasion jewels worth Rs. 500 in place of Rs. 3,000. He admitted receipt of the two cash items of Rs. 1,000 each, thus making up the total consideration to be Rs. 3,500. The second defendant denied having executed the promissory note sued on or put her mark on any of the other documents filed by the plaintiff purporting to bear it. The first defendant stated that he had put on the marks for his wife at the plaintiff's request.

The issues were—(1) did defendant No. II Mussammat Lalan Bibi execute the note for consideration received? (2) Whether defendant No. I received full consideration?

The first Court found both issues in plaintiff's favour and decreed the suit. The defendants appeal.

The argument of appellants was that defendant No. I was a man of wealth, who on attaining majority had contracted large debts which had necessitated his estate being again put under the Court of Wards, that at the time the present note was executed he was living on a small monthly allowance of Rs. 160, which was inadequate for his wants, that he cast about for a loan from somewhere, and the plaintiff, an astute *ex-lawyer's* clerk, caught him in his meshes and got him to execute the note for a grossly inadequate consideration. Counsel urged that defendant from his habits was reckless and improvident, and agreed to whatever was proposed in order to meet his present wants, that the doctrines of the English Court of Chancery in the case of expectant heirs and necessitous persons should be applied to give his client relief, and that the contract should be narrowly scrutinized and a decree passed for what was actually received, with reasonable interest thereon. He denied that Mussammat Lalan Bibi's execution of the note was proved. Finally, he contended that the evidence fully established his client's allegation that only Rs. 3,500 were received in jewellery and cash.

The points for determination in this appeal appear to be—

- (1) whether the female defendant executed the note sued on; and
- (2) what consideration was paid for the note?
- (3) whether, if the full consideration stated in the note was not paid, that which was actually paid was so grossly inadequate as to justify the setting aside

of the contract as an unconscionable bargain and, if so, what relief should be granted to the plaintiff?

Except in regard to the female defendant, who denies execution, which must therefore be proved by the plaintiff, the *onus* of proof of all contested matters appears, on the pleadings, to rest on the defence. The promissory note imports consideration, and if strict proof is not given of the facts alleged by the defendant, Fateh Ali Shah, plaintiff must get a full decree.

Cases in which relief is given by Courts of Equity to debtors by setting aside their contract may be roughly divided into two classes, (1) cases in which, in consideration of the relations between the parties to the contract, or physical or moral conditions which place the creditor in a position of undue superiority over the debtor, the former is required to satisfy the Court that he has acted with perfect good faith and fairness, the contract being at the outset looked upon with suspicion; (2) those in which without proof of the above circumstances the contract is shown by the evidence to be so extortionate and so hard on the debtor as to shock the conscience, and to throw doubt on the free consent of the debtor to the terms. In the former the *onus* of proving the validity of the contract is thrown on the creditor from the beginning. In the latter, the equitable jurisdiction of the Court comes into play only after the debtor has established his allegations unless upon the admissions in the pleadings he is discharged from this burden.

In our opinion the present case does not come under the former category. The defendant, Fateh Ali Shah, was not in the position of a young heir expectant or reversioner. He was a well grown and mature man of about thirty, who had already succeeded to a large estate. His mental capacity is not shown to be weak. He had on attaining majority wasted large sums in extravagance and debauchery, and contracted heavy debts which necessitated his estate being again placed in charge of the Court of Wards. This had its use in teaching him a lesson on the consequences of such a life as he had led and should have warned him against the dangers of reckless borrowing. He was literate and well able to understand business. He was not in any state of mental or bodily distress, or such necessity as made him incapable of weighing the consequences of the transaction he was entering into with the plaintiff. The latter had no previous dealings with him, and

had been introduced to him only a few days before. The exact circumstances under which the parties came together are explained by the plaintiff, and defendant has not alleged or proved anything to the contrary. As regards the plaintiff nothing particularly damaging was proved against him. He had been for a considerable time a lawyer's clerk, but though he went into the witness box and gave a full account of the transaction, nothing particularly damaging to his credit was brought out by the cross-examination. He may be a sharp and clever man of business, well able and ready to push his interests at the expense of others, but he has latterly held fairly respectable positions in life. There is nothing to show that he held a position of undue advantage with reference to the defendant Fateh Ali Shah. The latter was not in any necessitous condition such as made him incapable of protecting his own interests. He did not owe any money to plaintiff before, nor is it shown that there were debts due to others which he was pressed to discharge, and which compelled him to agree to plaintiff's hard conditions. His case is different from that of the merchant or tradesman in difficulties who, in order to save his credit, borrows money on ruinous terms, or of a person already deeply involved, who agrees to anything that his creditor proposes to avoid exposure, or to stave off his present difficulties. All that is alleged is that his estate being in the hands of the Court and his monthly allowance small he was anxious for a loan in order to gratify his taste for luxurious living. This fact alone does not place him in the category of those incapable of protecting themselves, whose interests are jealously regarded by the Courts and dealings with whom have to be shown to be fair and above board by the creditor at the outset. We hold therefore that the case must be treated as an ordinary case of debtor and creditor, and that the *onus* of proof of all the disputed facts is, on the pleadings, on the defendant Fateh Ali Shah. *Moti, Gulab Chand, &c. v. Mahomed Mehdi, Tharia Tovan, I. L. R., XX Bom., 367*, is clearly distinguishable.

We propose first to briefly consider the evidence with reference to the male defendant, and to take up the case as regards the female defendant last.

There is a formidable mass of documentary evidence against the defendant complete in every respect. In fact the completeness is used as an argument, possibly not without some show of reason, against the plaintiff. But nothing tangible can be inferred from this to the plaintiff's detriment,

while legally the defendant has to discharge the burden of showing them to be wrong. In proof of the first loan, there are—the promissory note, page v, and the receipt, page iv, and the letter, page vi; of the second, the promissory note, page i, the receipt, page viii, and the endorsement on the old note, and the letters, page ix and page x. There are two other letters, page iii and page vii, which also corroborate the plaintiff's story. The first asks for the loan of Rs. 6,000, and admits that jewels worth Rs. 5,000 have been inspected and approved. The second admits the first loan, and makes proposals for the second. In addition to these the letter, page xi, dated 12th July 1896, after the note sued on had fallen due and about seven months after the last of the transactions, seems completely to refute the defendants' allegation. There is no adequate explanation why he did not then repudiate his liability if his present story is true. Similarly the telegram, page xiii, sent to plaintiff after the institution of the case goes some way to strengthen the plaintiff's case.

Against this mass of documentary evidence, all admitted to be genuine, defendant has nothing to oppose but the oral testimony of a few servants, descendants or friends. This evidence has been minutely and carefully criticised by the District Judge, and we substantially agree with his remarks. It is absolutely impossible to rely on it and to hold that the defendants' allegation that only Rs. 1,500 worth of jewellery was given, and that plaintiff promised not to exact more if payment was punctually made.

The plaintiff has on his side produced oral evidence of the loan transactions which the District Judge considers superior in quality. We also agree in this opinion, supported as it is by the documentary evidence. There is absolutely no trace in the whole evidence of anything to lend support to the defendants' story. Plaintiff offered himself as a witness in his case, but defendant did not do so, though he was examined before the issues were framed.

There is little doubt that the plaintiff made a very handsome profit out of the loan transactions, but unless the defendants' allegation is established in fact we have no power to interfere with the contract. If the defendant has taken jewels at much above their value because he wanted them and could not have them on other terms he has no claim to ask the Court to relieve him of the consequences of his deliberate act. There is an equity founded upon the gross inadequacy of consideration,

but it can only be when the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition, *per Lord Westbury in Tennant v. Tennants, L. R. I. (P. C.,) Ap. 6.* This is not proved to be the case here. The appeal of this defendant must therefore fail.

As regards the female defendant we have, on the whole, no sufficient ground to differ from the view of the lower Court. The evidence in support of her presence is ample, if it is believed. The letter, page vii, corroborates the plaintiff's story. There is some discrepancy in the evidence as to her being in *parda*; but as it is admitted that she was a courtesan before her marriage with Fateh Ali Shah, her presence is not at all extraordinary. The jewels were probably approved by her as letter, page iii, says. The story of her husband forging her mark on all the documents bearing it is incredible. Defendants' evidence, as already stated, is practically worthless. It is to be noted that Mussammat Lalan Bibi never went into the witness box and denied her presence at Lahore, or her marks. Having regard to her antecedents there is no reason to doubt that she was well able to look after her own interests, and there is no objection that her consent was improperly obtained.

The appeal is dismissed with costs.

For reasons given in the judgment of the District Judge we decline to allow any further interest, and dismiss plaintiff's cross-objection with costs.

Appeal dismissed.

No. 61.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

SHAMAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

SARDHA AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 520 of 1896.

Custom—Alienation—Escheat—Right of proprietary body to contest alienation by widow of childless proprietor—Kangra District—Right to sue.

Found, that there is no custom by which, in the Kangra District, the estate of a childless proprietor escheats (after the death of the widow of such proprietor) to the village community or the owners of the sub-division in which the land is situate.

} APPELLATE SIDE.

Although under the existing revenue system two ingredients of jointness have been introduced among artificially created village communities, *viz.*, (i) joint right in the waste attached to each village, and (ii) joint liability for the revenue assessed on the village, the right of escheat is not a necessary consequence of such jointness, nor has it been declared to be so by any statutory provision.

Held, further, that even if by custom the widow of a childless proprietor was incompetent to alienate, or to give a valid title, except for necessity, it was not open to one who was not a reversioner to sue to set aside her act, and that in such a case the plaintiffs must succeed on the strength of his own title and cannot derive help from the widow's incapacity to alienate.

The question as to the reversionary rights of the proprietary body in such cases discussed historically by *Chatterji, J.*

Further appeal from the order of O. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 5th January 1896.

Lal Chand, for appellants.

Jaishi Ram, for respondents.

The facts of the case sufficiently appear from the judgment of the Court delivered by

10th June 1898.

CHATTERJI, J.—This appeal and No. 521 of 1896 are closely connected and practically the same points arise in both. They will therefore be disposed of by one judgment.

The material facts appear from the judgment of the Court of first instance. It is only necessary to note that in this appeal the subject of dispute is land sold to Sardha, respondent, by Mussammat Bhandejo, deceased, widow of Mussammat Ambo's husband's brother, and in appeal No. 521, land gifted by Mussammat Ambo to Kharku, respondent. The plaintiffs in both cases are the proprietors of *tika* Panditehr in *mauza* Passu, *tahsil* and District Kangra.

The plaintiffs claim declaratory decrees to the effect that the alienations by the widows would not effect their reversionary right to the lands alienated on the deaths of the widows, alleging that they are by law and custom entitled to succeed to the lands, as there are no heirs of the women's husbands. The substantial contentions on the part of the defendants are (1) that the plaintiffs have no vested right of escheat and have therefore no *locus standi* to sue, and (2) that the widows in the absence of heirs of their husbands have uncontrolled power of alienation under the *Riwaj-i-am*.

The first Court found that plaintiffs have the right of escheat by custom, and that the *Riwaj-i-am* only permits gifts

but not other kinds of transfer. It upheld a gift made by Mussammat Ambo in favour of one Shansa and dismissed the plaintiff's suit in regard to it which was jointly tried with the cases under appeal on this ground and plaintiffs did not carry that case any further. But it set aside the gift in favour of Kharku on the ground that the gift was not admitted by Mussammat Ambo and the possession of the donee was not shown by the revenue papers.

The Divisional Judge after remanding the cases for a further inquiry into custom found, in concurrence with the return of the officer who made the investigation, that the plaintiffs had failed to prove that the lands revert to them as owners of the *tika* in which they are situate, and that the custom is correctly recorded in the *Riwaj-i-am*, transfers for value being *à fortiori* valid when gifts are permitted. He held the gift to Kharku was complete.

Appellants' counsel directed his argument to establish two main points: *First*, he maintained that under circumstances, like the present, the proprietary body of the village or of the sub-division in which the land is situate are, by the general custom of the Punjab, entitled to succeed on the death of the widow, and that they have in consequence a sufficient *locus standi* to contest the widow's alienation; *secondly*, he insisted that the limitations upon the widow's estate are the very substance of its nature and not merely imposed for the benefit of reversioners, and that they exist fully even if there are no heirs at all. He quoted numerous authorities in support of both positions and challenged the correctness of the entry in the *Riwaj-i-am*.

With reference to the first point we are unable to accede to the contention that there is a universal custom of the kind mentioned in the Punjab. The authorities on the subject are conflicting. They are all collected and reviewed in No. 77, *Punjab Record*, 1896, and the conclusion arrived at was that no such general rule could be laid down. Counsel insists that this is an error, but we are unable to agree with him. Admittedly the authorities are not agreed on the point and opinions in support of appellants' view are opposed by others entitled to equal weight affirming the contrary. It appears to us difficult to lay down a rule of general application in a matter of this kind merely upon *à priori* grounds. Much would depend upon the facts of each case and the constitution of the village. In a village held on a strictly tribal tenure, or in which the

community is a compact one, the probability is that heirless land would be taken possession of by the tribesmen or the community, and that strangers would be excluded. It would perhaps be reasonable to presume even in the absence of actual instances that in the past and particularly in unsettled times they were able to assert and enforce this right with the support of public opinion and if necessary by physical force. The right of escheat would have an historical foundation in such communities. But no such inference can be drawn where the proprietors are a heterogeneous body and where possession is essentially the measure of right. Here the right of escheat ought to be affirmatively established by cogent evidence. It would not always be safe to assume the existence of such right merely because under the existing revenue system there is a joint liability for revenue or where such land exists, because there is some common waste land for pasture and other purposes. In many cases as shown in No. 77, *Punjab Record*, 1896, it was found on actual inquiry that the right did not exist. Considering the diverse character of village tenures in this Province, it is obviously unsafe to formulate a general rule on the subject of escheats to village proprietors. We therefore see no good reason to differ from the view taken in the case above cited.

Further even if it could be held on the strength of the authorities cited by appellants that the custom of escheat set up by them can be presumed to exist in certain parts of the Province it would be impossible to extend the presumption to villages in the hills of Eastern Punjab. Land in the Kangra District is not ordinarily held on tribal principles, and a village community there is something very different from a village community in the plains. In theory a Punjab village is ordinarily a piece of land originally waste acquired by conquest, purchase or other manner and settled upon and brought under cultivation by one or more members of a single tribe, or by a number of persons or families belonging to two or more tribes associated for this purpose. The entire proprietary right belongs to the founders or their descendants subject to payment of revenue dues to the ruling power. In the hills before the advent of British rule each Raja was theoretically the landlord of the entire area included within his *raj* or principality. He was as it were the manorial lord of the whole country. He was the acknowledged fountain of all rights in the soil and no tenure was complete without investiture from

him. This distinction is the key to the proper understanding of the hill tenures. The difference between a village or *mauza* in the plains and one in the hills is also very well marked. To quote the words of Mr. (now Sir James) Lyall: "In the plains the boundaries of a *mauza* are the boundaries of a property, but in the hills the boundaries have no more to do with property than have those of a parish in England at the present day, and as parishes grew out of one person taking the tithes so these *mauzas* or circuits seem to have grown out of one man for a length of time collecting the land rents either as an agent or an assignee of Government The circuit as regards its waste lands was a mere arbitrary and loosely defined division of the principality. As regards its cultivated lands it was a chance collection of independent family holdings." As regards individual holdings, the highest form of property recognised in the hills was the hereditary right of cultivation, *warisi*. This right was conferred by a deed of grant or *patta* from the Raja. A *patta* was never granted for a whole village or for a whole hamlet, nor for a block of country containing waste as well as arable land, but always for specified fields or culturable plots alone of which not only the rent but the name and area were specifically entered on the deed, and the grantee ostensibly acquired no title beyond the four corners of his *patta* (Gazetteer of the Kangra District, pages 105, 106). Mr. Lyall thus describes this class of landholders ". . . . The landholder was rather a crown tenant than a landlord. He called his right a *warisi* or inheritance, not a *maliki* or lordship, and the same term applied to every kind of interest held of the Raja" (Settlement Report, page 22).

This was the condition of the land tenures before the British conquest. The consequences that ensued upon the substitution of British for native rule are thus summarized in the Gazetteer: "The introduction of the British rule was immediately followed by a settlement of the land revenue upon principles imported from the plain country of the North-Western Provinces. Under the transforming hand of the officer, who conducted the settlement, the loose circuits of the Rajas became estates in a technical sense, i.e., revenue-paying units. Boundaries were set up defining the limits of villages and (south of the Beas) of hamlets, in the waste, and of the areas thus defined the holders of the cultivated plots were declared to be joint proprietors in the sense in which that term is used in the plains. In other words, the

“body of landholders in each circuit were converted into a
“proprietary community, each sharer in which was proprietor
“of his own holding and co-proprietor with his fellows in the
“waste. Moreover the whole area of the district, waste as well
“as cultivated, was included in the village boundaries then for
“the first time laid down as a natural corollary
“to this, when the time came for assessment the revenue of
“each circuit was assessed as a lump sum for the payment of
“which the whole body of landholders became jointly responsi-
“ble during the term of settlement. Great as this revolution
“was, it appears to have been quietly acquiesced in by the
“people who indeed were considerable gainers by the innovation,
“for with the right of property acquired in the waste the
“village communities received by way of compensation for the
“imposed responsibility, the right to collect and divide among
“themselves certain items of income arising from it, which
“formerly were included in the regular land rents in the
“annual collections made by the State. In the changes thus
“effected the individual holdings of the cultivated land alone
“remained unmodified. Upon these the effect of the settlement
“proceedings was to confirm the tenure, making it *de jure* as
“well as *de facto* proprietary” (pages 112, 113).

The foregoing extracts show in our opinion the fatality of the contention that in the Kangra District by custom the estate of a childless proprietor escheats to the village community or the owners of the sub-division in which the land is situate. There was formerly no ownership, no village community. There could therefore be no escheat to the latter, and if there was any escheat at all it must have been to the Raja or ruling authority. The claim of the plaintiffs has no historical foundation, but is one unknown to the country and supported by false analogies drawn from tenures prevailing elsewhere, the features of which are wholly dissimilar. It is true that under the existing revenue system two ingredients of jointness have been introduced among these artificially created village communities—(1) joint right in the waste assigned to each village, (2) joint liability for the revenue assessed on the village. But the right of escheat is not a necessary consequence of this jointness, nor has it been declared to be so by any statutory provision.

We are of opinion therefore that there is no presumption whatever in favour of the right claimed by the plaintiffs in this case, and that the authorities cited, even if they are correct,

have no application to that part of the country where the disputed land is situate. We are, therefore, unable to accede to counsel's prayer that the question might be referred to a Full Bench. Plaintiffs are bound to affirmatively prove the right of escheat by reliable legal evidence.

That village proprietors in the hills have, since the introduction of the British revenue settlements, been allowed to take possession of lands of heirless owners in some instances may be admitted. The areas would ordinarily be small, and the crown seldom cares to enforce its right of escheat as it rarely likes to take upon itself the direct management of land. Such cases prove nothing in favour of the plaintiffs, and in fact sufficient time has not elapsed since the advent of British rule for a new custom of this kind, foreign to the traditions and institutions of the people to grow up and acquire a binding effect over the whole community. The instances adduced by the plaintiff therefore hardly merit a detailed notice, and though counsel have discussed them at considerable length a brief examination of them will suffice.

The first two witnesses of the plaintiffs, Mansukh, Lambardar, and Fakiria simply say that the heirless land reverts to the *tika*, and quote two instances, one from Rehlu and the other from Sidhbari. These are not in point. They also say that a widow without reversioners can be restrained from making alienations without necessity by the owners of the *tika*, but can cite no instances. The third witness, Bysakhi, quotes two fresh instances, one of which from Sarah is a mere case of reversion. The other is said to have been a case in which the widow's alienation was successfully impeached in Court by the owners of the *tika*, but the file has not been produced, and it is not possible to say how far it is relevant. The fourth witness, Misru, quotes an instance from Narli similar to the last, but there is no record to show its real nature. He also cites another from Banihar, but does not give names or details, and consequently no weight can be attached to it. This is the whole of the oral evidence of the plaintiffs on the point of custom, and it cannot be said that their case is much advanced thereby. It is unnecessary to notice defendants' oral evidence at length. Their witnesses quote numerous instances in opposition to the plaintiffs' contention, but they cannot be said to be of much value as they rest on mere oral testimony and the details are not sufficient. In the remand inquiry more definite evidence was produced by them, but it related to the correct-

ness of the entry in the *Riwaj-i-am* rather than to the point of custom we are discussing, though it has a material bearing on it. It will be adverted to again. Upon a comparison of the oral evidence on both sides there is little difficulty in holding that defendants' evidence is at least as good and if not better than that of the plaintiffs, and that the latter is insufficient to establish the plaintiffs' case.

Turning now to the cases in Court. There are two mutation cases (1) of land left by one Mussammat Jalli in *mauza* Rori-kori, who died heirless, which, by order of the Commissioner, dated 30th September 1880, was entered as *shamilat* of the village; (2) of land left by a *Sudni* of Nuti, Mussammat Pakru, who also died *lawaris* according to the report of the *lambardar* who wanted it to be recorded as *shamilat* of the *tika*, and this was allowed on 18th May 1882. There were no objectors in either case, and they are not of any value on the question before us.

Of the cases decided in the Civil Courts only three have any bearing, and they are:—

- (1). *Durgu, plaintiff, v. Totu and others, proprietors of tika Noushera, in Rehlu, defendants* (1891).—This was a claim by the brother of a widow for some land which she had inherited from her husband on the strength of a gift alleged to have been made by her. The gift was not proved, and the possession of the owners of the *tika* was maintained. The Divisional Judge declined to go into the question of the relative priorities of the plaintiff and the defendant to succeed as heir holding that plaintiff had sued on the ground of a gift alone which he had failed to establish.
- (2). *Chartu, &c., plaintiffs, v. Badri, &c., defendants*.—The former as proprietors of *tika Panag* in the village of Katrah, claimed possession of land left by one Harbhaj who died heirless. The Divisional Judge, Mr. Bullock, was of opinion on grounds similar to those mentioned in our judgment, that there was no escheat to the plaintiffs, but nevertheless in deference to the views of the Chief Court expressed in No. 80, *Punjab Record*, 1885, found in their favour. On appeal to the Chief Court a further inquiry was made, and it was

found that one of the plaintiffs, Nanak, was related to the deceased in the female line, and on the ground that he had a superior right to the defendants, the decree was upheld by Mr. Justice Benton on 3rd April 1890.

- (3). Sansar Singh and others, plaintiffs, *v.* Golaba and others, defendants. The plaintiffs were the proprietary body of *tika uparla* of Bunhar, while the defendants claimed to be mortgagees and vendees of different portions of the land in suit. The plaintiffs *locus standi* was disputed, but impliedly upheld up to the Chief Court.

It will be seen that there is only one case, *viz.*, the last, which supports the plaintiffs' claim, but even here there was no exhaustive inquiry and the considerations adverted to by us and mentioned by Mr. Bullock in his judgment in the second case were not discussed and disposed of. It is insufficient by itself in the absence of other proof to establish the plaintiffs' claim.

The *Wajib-ul-arz* does not recognize any such right as is claimed by the plaintiffs. Clause 31 only provides for land left by absentees who have no relations in the *tika* or village.

We accordingly hold that plaintiffs have failed to show that they are entitled to the land by escheat according to the custom of the country. They cannot, therefore, be treated as the presumptive reversioners of the widows Mussammam Ambo or Mussammam Bhandejo. It may be mentioned here that the proprietors of the plaintiff's *tika* are a mixed body consisting of Rajputs, Grisths and others, and that there is not a single Jat among them besides Mussammam Ambo.

As regards the second point argued by counsel, we are of opinion that the cases quoted by him, even if applicable, do not help his clients. The decision of their Lordship of the Privy Council in *Cavalry Vencatas* case, 8 M. I. A., 520, was upon Hindu Law, while the parties here are presumably bound by custom. But assuming that the ruling applies it only shows that the widow cannot give a valid title if she alienates without necessity, but does not enable a person who is not a reversioner, or is a mere stranger to sue to set aside her act, Mayne's *Hindu Law*, 5th Edition, Section 599, *Brojo Kishoree Dasee v. Sree Nath Bose*, IX W. R., 463. Had the plaintiffs got possession they might possibly, if no custom against them was found,

have successfully resisted claims by the alienees for possession on the ground that the transfers in their favour were void and conferred no right. But the case is different when plaintiffs seek to have the deeds declared invalid. They have then to succeed on the strength of their own title and to establish their *locus standi*. They can derive no help from the widow's incapacity for alienation.

In the present case the *Riwaj-i-am* supports the contention of the defendants. It is true that it only speaks of gifts, but transfers for consideration are *à fortiori* within the rule. The remand inquiry shows the custom at all events prevails among the Jats, and the plaintiffs have failed to produce sufficient rebutting evidence. For the purposes of the present case the finding of the Divisional Judge should therefore be upheld. Whether the evidence is sufficient to defeat any right of escheat the crown may possess in cases of this kind is a question into which we need not enter. There is no claim by the crown and the plaintiffs are not the assignees of the crown.

On all grounds therefore the plaintiffs' claims fail and have been rightly dismissed. As regards the gift to Kharku the present suit decides nothing between him and Mussammatt Ambo, but it is clear that so far as the plaintiffs are concerned the gift is perfectly good.

The appeal is dismissed with costs.

Appeal dismissed.

No. 62.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

RANA GANPAT SINGH,—(PLAINTIFF),—APPELLANT,

Versus

KANGRA VALLEY SLATE COMPANY,—(DEFENDANTS),—RESPONDENTS.

Case No. 910 of 1896.

Easement—Right of way—Public or private road—"Question of law"—Limitation Act, 1877, Section 26—User of road by public for less than 20 years—Presumption as to dedication—English law.

The principles of the English law regarding the presumed dedication of a road to the public arising from user of such road by the public, being founded on reason and commonsense and conducive to public convenience, are applicable to India.

Held, therefore, that the user of a road by the public, openly and as of right, is sufficient, apart from the law laid down in the Limitation Act,

APPELLATE SIDE. {

1877, Section 26, to raise a presumption of its dedication to their use, though such presumption might be rebutted by evidence of the owner's intention that the public should only have a permissive user.

In the present case the evidence clearly showed that the road in dispute had been used as a public road for at least 10 years prior to suit, but the Divisional Judge, treating the case as one of prescription, found in favour of defendants because 20 years had not elapsed since the road was opened (Section 26 of the Limitation Act, 1877).

Held, under the circumstances as above set forth, that there was a presumption that the road had been dedicated to the use of the public, and found, upon the evidence and facts of the case, that defendants had failed to rebut such presumption.

The right of the public to pass over a public road is not in the nature of an easement properly so called, nor is it acquired by prescription under Section 26 of the Limitation Act, 1877.

A preliminary objection on behalf of defendants that there was no ground for admitting a further appeal in the case as there was no "question of law" involved, overruled on the grounds that the questions (a) whether plaintiff had not acquired a right of way over the road in dispute either by long user or grant; (b) whether the road came under the category of a public or a private road, involved consideration of points of law, and were not simple questions of fact.

Held, further, that the Divisional Judge's error in law in deciding the point under Section 26 of the Limitation Act was of itself a sufficient ground for admitting a further appeal, though it was not the ground on which the appeal was admitted by the Judge in chambers.

Further appeal from the order of C. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 27th November 1895.

Jaishi Ram, for appellant.

Beechey, for respondents.

The facts of the case sufficiently appear from the judgment of the Court delivered by

CHATTERJI, J.—The facts of this case sufficiently appear from the judgments of the lower Courts. The suit is to establish the plaintiff's right of way over the road marked P. M. X. N. Y. on the plan filed in the first Court on the ground that the road is a public one, and that plaintiff has been unlawfully prevented by the defendants from going over it. There is also a question whether the plaintiff's pleadings include a claim on the ground of an easement, but it is strongly objected on the respondents' side that they cannot do so.

1st July 1898.

The substance of defendants' contention was that the portion of the road marked X. N. Y. is private and belongs to them. This formed the subject of the first issue.

The first Court found that X. N. Y. was a public road and decreed the claim. On appeal the Divisional Judge declared the portions P. X. and N. Y. to be parts of a public road, but the part X. N. to be a private road and the property of the defendants and modified the first Court's decree to this extent.

The portion N. Y. runs past the godowns of the defendants and over ground belonging to them. Their counsel contends that this part of the decree is due to a mistake of the Divisional Judge, and that the public road begins from the point Y., but they did not appeal, and it is obvious that for the purposes of this case N. Y. must be held to be a public road.

A preliminary objection taken by the respondent may be noticed here. It was contended that there was no ground for admitting a further appeal as there was no point of law involved, and the finding that X. N. is a private and not a public road is a finding of fact. The point raised by the learned Judge who admitted the appeal, *viz.*, whether plaintiff had not acquired a right of way over X. N. either by long user or grant is a point of law, and the objection that it does not arise on the plaint and the pleadings and is not therefore involved in the case is one relating to the merits of the case and not a preliminary objection. The contention was therefore overruled and the hearing proceeded on the merits. Moreover the question whether the road X. N. comes under the category of a public or a private road is one involving consideration of points of law and is not a simple question of fact. The Divisional Judge in deciding it has applied the law of prescription laid down in Section 26 of the Limitation Act.

The evidence on both sides clearly shows that the whole road, including the portion X. N. or X. Y., is used as a public road, and has been so used for at least ten years. In 1883 the greater part of it was constructed by the defendants with the help of the District Board of Kangra which contributed half the cost of construction, Rs. 242, but the portion X. N., if not the entire length X. Y. (though apparently the Divisional Judge finds otherwise), was not made as Singhara, the owner of the land, through which it runs, did not agree to its being made, *vide* letter of Mr. Connor, Engineer and Manager of the defendants' company, dated 19th March 1894. There was, however, an old pathway Q. O. which was public. In June 1885 defendants purchased the land of Singhara and filled up the gap between the portions of the road made in 1833 by con-

structing the portion X. N. The old path Q. O. then fell into disuse, and the whole of the new road, including the portions X. N. and N. Y., was used by the public without any objection or hinderance on the part of the defendants.

It would appear from the correspondence with the District Board that defendants' Manager in obtaining pecuniary aid from the Board gave some indication of an intention that the road would be for the benefit of the public, *vide* Mr. McBean's letter, dated 11th June 1883, written under the authority of Mr. Masson, the Managing Director, asking for the contribution of Rs. 242. It speaks of conferring a boon on the public who deal with the company by making the road. This of course does not show that the road was to be a public one, but the subsequent letter of Mr. Connor, dated 9th March 1884, speaks of the break at Singhara's field, and asks that at the time of inspection it might "be considered whether it would not be "advisable for the company to acquire sufficient of the above "land to make the road, as it is required for a public purpose, "the company bearing the cost of the land and of making the road." The Board did not help to acquire the land which the defendants purchased next year and the letters themselves, though they do not establish any definite promise to make the road or the portion X. N. public, help to throw light, taken in connection with the surrounding circumstances and the other evidence and the admission of the defendants as to the use of the road, on their intention in making the road.

The natural inference from the evidence and the use of the road as respects this intention is that it was to make the road a public one and this is strongly supported by the fact that the old public pathway Q. O. now disused for which X. N. and N. Y. have been substituted is now included in the cultivation of the defendants' tenant Singhara. The land through which the portions X. N. and N. Y. run is no doubt defendants' private property, and no doubt they were constructed with defendants' money, but these facts are not inconsistent with their being parts of a public road. The public user of the road has lasted at least ten years, and this is sufficient as we understand the law applicable to the subject to establish the right of the public in the absence of cogent rebutting proof on the part of the defendants. The Divisional Judge has treated the case as one of prescription and found in defendants' favour, because 20 years have not elapsed since the road was opened, but this is a clear mistake. The right of the public to pass over a public road is not in the nature of an

easement properly so called, nor is it acquired by prescription under Section 26 of the Limitation Act. Mr. Beechey for the respondents, admits that the Divisional Judge's view is erroneous, but urges that the finding that the road is not a public road is independent of the above argument and is given at an earlier part of the judgment, and that it is only used to strengthen that finding and to meet a possible contention on the part of the plaintiff. This, however, does not appear to be the case. The Divisional Judge gives no reasons for holding the road not to be a public road in spite of the use by the public except in the passage in question. In an earlier part of the judgment he merely recites the fact of the purchase by the defendants, and says the land as well as the road is private. In the passage referred to he gives his reasons for his opinion which are (1) that 20 years had not yet elapsed, and (2) no public money had been spent on the portion X. N. In finding the road not to be a public one as claimed by plaintiff the Divisional Judge appears thus to have committed an error in law which of itself is a sufficient ground for admitting a further appeal in this case, though it is not the one on which the appeal has been admitted.

By the law of England public rights over a highway rest upon a dedication express or presumed from user by the public. The whole is pithily summarized in the following passage in *Dart on Vendors and Purchasers*, 6th Edition, Volume I, page 411. "A road may be a common highway even, though it is "only occasionally used by the public, or is circuitous or does not "terminate in a town or in some other public road, and a very, "short continuous user of it by the public openly, and as if right "is sufficient to raise a presumption of its dedication to their use, "but the presumption may be rebutted by evidence of the owner's "intention that the public should only have a permissive user as "e. g., by his arbitrarily closing the way for one day in each year "or by showing that the state of the title was such that a binding dedication was impossible, but mere non-user for any "number of years will not destroy or prevent the public from "resuming the right to a public way, though it may be evidence "that no such right ever existed. The soil of a road, whether "public or private, *usque ad medium filum viae*, is presumed to "belong to the adjoining owners". In *Smith's Leading Cases*, Volume II, 9th Edition, page 165, the mode of creation of public highways is thus stated: "Except where this "is done by the express enactment of the legislature, it derives

"its existence from a dedication to the public by the owner of
 "the land over which the highway extends of a right of passage
 "over it, and this dedication, though it be not made in express
 "terms as it indeed seldom is, may and will be presumed from an
 "uninterrupted use by the public of the right of way claimed."
 In *Rugby Charity v. Merry Weather* (11 Ea., 376n), a period of
 six years' user was held sufficient proof of dedication. In *Queen*
v. Petrie, &c., 24 L. J. Rep., Q. B. 167, and *Powers v. Bathurst*, 49
 L. J. Rep., Ch. 294, it was laid down that an open user as of right
 by the public raises a presumptive inference of dedication
 requiring to be rebutted and that the *onus* of displacing the
 presumption lies on the person seeking to deny the inference
 from the public user. In *Woodyer v. Hadden*, 5 Taunt, 12,
 Chamber, J., said: "No particular time is necessary for evidence
 "of a dedication. If the act of dedication is unequivocal it may
 "take place immediately. For instance, if a man build a double
 "row of houses opening into an ancient street at each end
 "making a street and sells or lets the houses that is instantly
 "a highway."

The above principles have been held to apply to India,
 being founded on reason and commonsense and conducive to
 public convenience. In *J. Anderson v. Juggodumba Debi*, 6 Calc.
 L. R., 282, the presumption in regard to dedication from user
 were held to govern a case from the *mafussil* in Bengal. In
Nihal Chand v. Azmat Ali Khan, I. L. R., VII All., 362, the
 rule about ownership of land of disused highways was followed.
 So also in regard to obstructions of public roads the remedial
 provisions of English law have been held to regulate this
 right of suit.

Adverting now to the facts of the present case, we must
 hold with reference to the above authorities that in the absence
 of cogent rebutting evidence on the part of the defendants,
 the whole road, including the portion X. N. declared private
 by the Divisional Judge, is a public road. The previous
 correspondence and the other circumstances mentioned above,
 as well as the unanimous testimony of witnesses on both sides,
 show an intention on the part of the defendants to make the
 road public and are sufficient to prove a dedication of it as
 such by them, and the *onus* is on them to prove the contrary.
 This they have failed to do. Nor is it open to them now to
 say that they have changed their original intention and are
 not willing to let the public use the road. In fact they have
 not even said this much for the general public are not hin-
 dered from going over the road, but it is only the plaintiff that

is not permitted to do so, according to the Divisional Judge, because Mr. Seale, the defendants' manager, has a long standing quarrel with him. There was no objection taken that on the assumption that the road is a public one, the plaintiff's suit to establish the right to pass over it did not lie, but had it been the above fact would have furnished a complete answer. Similarly it is a complete answer to the contention that if X. N. were declared a public road it would depreciate the value of the defendants' property. They have filed no appeal in respect of N. Y.

We find therefore that the road X. N. is part of a public road, and that the plaintiff is entitled to pass over it without obstruction by the defendants.

We accept the appeal and restore the decree of the first Court with all subsequent costs.

Appeal allowed.

No. 63.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

PRITHA DAS,—(PLAINTIFF),—APPELLANT,

Versus

HIRA SINGH,—(DEFENDANT),—RESPONDENT.

Case No. 992 of 1896.

APPELLATE SIDE. }

Suit for recovery of money paid to agent for unlawful purpose—Suit instituted before execution of unlawful object—Principal and agent—Contract Act, 1872, Section 23—Locus penitentiae.

Plaintiff sued on the allegations that he paid a sum of Rs. 300 to the defendant, a friend of his, to procure him a bride; that defendant had represented that this sum was to be paid to the bride's father in advance, and the betrothal performed on the 9th Nauratra; that no betrothal had taken place, and that defendant on being asked to refund had denied the receipt of the money. Defendant denied the transaction altogether. The first Court found that plaintiff's allegations were proved and that he was entitled to recover, but the Divisional Judge, on appeal, held that the defendant had undertaken to act as a mere procurer, that the contract was opposed to morality and public policy, and, following No. 116, *Punjab Record*, 1880, dismissed the suit without going into the facts. Plaintiff appealed to the Chief Court.

Held, that inasmuch as, upon the true construction of the transaction, defendant was merely a go-between or agent of the plaintiff for paying the money to the bride's father, the property in the money did not pass to the defendant but remained with the plaintiff so long as it continued in defendant's hands or until it was paid over to the father of the intended bride.

Held, therefore, that the suit was maintainable.

A person who pays money to his agent, whether on the agent's representation or of his own motion, for an unlawful purpose is entitled to a *locus penitentie* and can call back his money at any time before the purpose is executed, nor in such a case can the agent, merely because he was entrusted with an unlawful commission, repudiate his liability to refund and appropriate the money to his own use.

I. L. R., XXIII *Calc.*, 962; *I. L. R.*, XVIII *Mad.*, 388; No. 106, *Punjab Record*, 1879; No. 50, *Punjab Record*, 1880; No. 116, *Punjab Record*, 1880; No. 128, *Punjab Record*, 1889; *Taylor v. Bowers* (*L. R. I.*, Q. B. D., 291) and *Kearley v. Thomson*, (*L. R.*, XXIV, Q. B. D. 747), referred to.

Further appeal from the order of Sardar Gurdial Singh, Man, Divisional Judge, Ferozepore Division, dated 3rd July 1896.

Krishen Singh, for appellant.

Morton, for respondent.

The judgment of the Court was delivered by

CHATTERJI, J.—In this case the plaintiff alleged that he gave Rs. 300 to the defendant, a friend of his, in order to procure him a bride, that defendant had represented that this sum was to be paid to the bride's father in advance and the betrothal performed on the 9th *Nauratra*, that no betrothal had taken place, and that defendant on being asked to refund had denied the receipt of the money. 4th July 1898.

Defendant denied the transaction altogether and pleaded that suit was false and had been lodged for an ulterior purpose.

The first Court found the plaintiff's allegation proved and that he was entitled to recover. It therefore gave plaintiff a decree. The Divisional Judge held that the defendant had undertaken to act as a mere procurer, that the contract was opposed to morality and public policy, and, following No. 116, *Punjab Record*, 1880, dismissed the suit without going into the facts.

In our opinion the Divisional Judge has acted on an erroneous view of the law. Payment to the guardian of a minor girl in order to secure his consent for her betrothal and marriage to the plaintiff was held to be improper and opposed to public policy in No. 128, *Punjab Record*, 1889, F. B., and the contract was held to be void. But the present defendant was a third party who undertook to procure a bride by paying the money advanced by the plaintiff to the girl's father. The case is not similar to No. 116, *Punjab Record*, 1880, where the money was actually paid away by the defendant to the bride's reputed mother and the marriage performed, but appears to be exactly

on all fours with No. 50, *Punjab Record*, 1880. In No. 106⁷ *Punjab Record*, 1879, a suit by the bridegroom for money paid to the bride's father in consideration of his daughter's marriage with the former was held to be maintainable, the marriage not having been performed, the Court mainly relying on the rule of English law that money paid under an unlawful agreement may be recovered back when nothing else has been done in performance of it. Here the money had not been paid to the defendant as his remuneration for the trouble in procuring a bride but merely as an intermediary to pass on to the bride's father. These being the facts, there could be no hesitation in deciding it in accordance with No. 50, *Punjab Record*, 1880; but for the circumstance that the principle of English law on which No. 106 of 1879 was decided has been questioned of late years. The doctrine laid down in *Taylor v. Bowers*, L. R. I., Q. B. D., 291, and the earlier cases was doubted in the recent case of *Kearley v. Thomson*, XXIV Q. B. D., 747. Sir Frederick Pollock in the 6th Edition (1894) of his work on *Contract* lays down the rule to be that such money cannot be recovered back "unless nothing" has been done in the execution of the unlawful purpose beyond "the payment" itself, and doubtfully adds the proposition "and" "the agreement is not positively criminal or immoral" (pages 368, 369). *Kearley v. Thomson* was cited with approval in *Rangammal v. Venkatachari*, I. L. R., XVIII Mad., 388. Sir W. Anson, *Law of Contract*, 8th Edition, page 218, is of opinion that the authority of *Taylor v. Bowers* is much shaken by the opinion expressed by the Court of appeal in *Kearley v. Thomson*, that the principle acted on in the former case "may at some" "time hereafter require consideration, if not in this Court yet" "in a higher tribunal."

After giving the matter our best consideration, however, we are of opinion that the rule would hold good for a case of the present description, and that the money is recoverable. It must be borne in mind that there is strictly speaking no contract that the defendant should receive the money in consideration of procuring a bride for the plaintiff. Had this been the case the decision would probably have been more difficult. But when the transaction between the parties is analysed it appears that defendant is simply a go-between, a mere agent of the plaintiff, for paying the money to the girl's father. That being so, the property in the money did not pass to the defendant, but remained with the plaintiff as long as it continued in defendant's hands, or until it was paid over to the father of the intended

bride. We are of opinion that a person who pays money to his agent, whether on the agent's representation or of his own motion, for an unlawful purpose, is entitled to a *locus penitentiae* and can call back his money at any time before the purpose is executed. The agent cannot, merely because he was entrusted with an unlawful commission, repudiate his liability to refund under such circumstances and appropriate the money to his own use. A man does not forfeit his right to his property, merely because he has contemplated the performance of an unlawful act. The distinction drawn in *Goberdhan Singh v. Ritu Roy*, I. L. R., XXIII Cal., 962, supports this view. Moreover, the purpose in the present case, if opposed to public policy, was not criminal or immoral (Section 23, Contract Act, clauses (j) and (k)).

We accordingly hold that the suit is maintainable, and accepting the appeal set aside the decree of the Divisional Judge, and remand the case under Sections $\frac{5}{8}$ $\frac{4}{8}$ $\frac{2}{8}$, Civil Procedure Code, for a decision on the merits. Court-fee on the petition of appeal will be refunded, other costs will abide the result.

Appeal allowed : cause remanded.

No. 64.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

IMAM DIN AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS,

Versus

FEROZ KHAN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 208 of 1896.

Landlord and tenant—Suit by tenant who has been ejected for possession—Suit instituted more than one year after ejectment—Punjab Tenancy Act, 1887, Sections 50, 77 (3) (g)—Jurisdiction of Civil Court.

Held, that Section 50 of the Punjab Tenancy Act, 1887, does not restrict the period of limitation allowed to a dispossessed occupancy tenant when suing for possession in the Civil Courts.

Where, therefore, plaintiffs who had been ejected from their occupancy holding in 1888, sued in the Civil Court long before the expiry of twelve years.

Held, that plaintiff's suit was not barred by Section 50 of the said Act. *Further appeal from the order of E. W. Parker, Esquire, Divisional Judge, Rawalpindi, dated 22nd November 1895.*

Ishwar Das, for appellants.

The judgment of the Court was delivered by

14th July 1898.

ANDERSON, J.—The facts of this case are made plain by the judgment of the Divisional Judge. He has held that the plaintiffs were, in fact, ejected from their occupancy holding about 1888. They have brought suit in the Civil Court long before twelve years have elapsed since the date of ejectment. The Divisional Judge has held, after fully considering the question, that plaintiffs' only legal remedy was to sue in the Revenue Court under Sections 50 and 77, Sub-Section 3, clause (g) of the Tenancy Act of 1887 which remedy they have lost. He further remarked that the rulings of this Court Nos. 44 and 45 of *Punjab Record*, 1895, furnish authority for holding that a tenant, who allows the period of one year to elapse without filing a suit, must be taken to have relinquished his right to be still regarded as a tenant, subject to any recognized disability.

The point for decision is, as observed by the Divisional Judge in his note annexed to the decision, one of some importance. We have given it our best consideration and referred to the rulings bearing on the question published before and since Act XVI of 1887 came into force.

In *Punjab Record*, No. 54 of 1879, it was held, following *Punjab Record*, 80 of No. 1876, that there is no rule of law that a tenant with rights of occupancy, who has been illegally dispossessed by his landlord, the proprietor, is bound to sue forthwith for recovery of possession and that, if he do not do so and his landlord make arrangements for the cultivation, the tenant's right of occupancy is extinguished. In *Punjab Record*, No. 80 of 1876, it was remarked that abandonment of the land, even for one year, would be evidence from which an intention to give up the right might be inferred, but mere delay in suing does not necessarily lead to the inference that the tenant has relinquished his right of occupancy. These rulings were given at a time when Act XXVIII of 1868 was in force which contained no section corresponding exactly with Section 50 of the Act of 1887, and at that time there was no such distinction drawn between the jurisdiction of the Civil and Revenue Courts as now subsists.

We are unable to agree with the Divisional Judge in holding that it was the intention of the legislature when enacting Section 50 of the new Act to restrict the period of limitation formerly allowed by our Courts to a dispossessed tenant when suing. We consider ourselves justified in adopting this view

to a great extent by the decision in *Punjab Record*, No. 45 of 1891, which was passed after specially considering the reasons stated by Sir Meredyth Plowden in his order referring the case to a Full Bench. The learned Judges thus summed up: "We consider that full effect may be given to the intention of the legislature by holding that, for the purposes of the Act, a tenant who has been dispossessed can, for the period of one year from the date of his dispossession, claim to be still regarded as a tenant *quoad* his landlord, his suit for recovery of possession being (as expressly provided) cognizable by the Revenue Court. If he allows the period of one year to elapse without making any claim he must be taken . . . to have relinquished his right to be still regarded as a tenant and his remedy (if such still exists) as to which it is not necessary to give any opinion upon this reference (*viz.*, a reference under Section 100 of the Punjab Tenancy Act) must be sought in the Civil and not in the Revenue Court." In para. 3 of page 243 of the same volume Sir Meredyth Plowden, Senior Judge, remarked "ordinarily, then a tenant is a person who has a right to hold and does hold, and the person described in Section 50 is a tenant only by an exceptional use of the term tenant, and only as it seems to me, during the period prescribed for bringing this special suit granted to him by Section 50 and for the purpose of exercising this right to sue." See also remarks in para. 5 of page 243 continued in page 244. It is clear from the above that the learned Senior Judge was disposed to construe Section 50 of the Tenancy as enabling rather than restrictive, and we think now that the point which remained undecided in 1895 has come up for decision, that we cannot do better than follow this view which appears to be the most consonant with justice and certainly not, so far as we can see, opposed to any explicit legal enactment.

In the present case both Courts are agreed that plaintiffs were wrongfully dispossessed and defendants' evidence tendered to prove voluntary abandonment was utterly discredited. The plaintiffs, one of whom is a female, have no doubt delayed in suing, but for this some explanation has been offered, and it is not for this Court to go, as it were, out of its way, in order to cast a doubt on the correctness of the finding of the Courts below as to the facts. These being as found, we consider the legal point should be determined in favour of the appellants and for the reasons stated we take a different view from that of the learned Divisional Judge as to the scope of Section 50

of Act XVI of 1887, and hold that the plaintiffs are not debarred by it from bringing the présent suit.

We accept the appeal and restore the order of the first Court, but as the point involved was one of some doubt and difficulty we think it fair to order that each party bear his own costs throughout.

Appeal allowed.

No. 65.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

SHANKAR DAS,—(PLAINTIFF),—APPELLANT,

*Versus*KAILASH CHANDAR AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 453 of 1896.

Pre-emption, suit for—Sale or contract to sell—Construction of document—Transfer of Property Act, 1882, Section 54.

According to the terms of a certain deed, which was stamped with a one rupee stamp, the vendor undertook to satisfy plaintiff further as to the vendor's title, and to execute a deed of sale within three months, after which, if such deed was not executed, plaintiff might sue for specific performance. The amount of the purchase money was Rs. 15,000, of which Rs. 4,300 was proved to have been paid in cash to the vendor.

Held, that the deed, rightly construed, amounted merely to a contract to sell and not a sale, and that the payment of consideration did not necessarily imply that the deed was a sale.

Held, further, that, under Section 54 of the Transfer of Property Act, 1882, which, though not in force in the Punjab, represents generally the law in force in British India, a contract for sale of immoveable property does not of itself create any interest in, or charge upon, such property.

Further appeal from the order of J. G. M. Rennie, Esquire, Divisional Judge, Lahore Division, dated 9th April 1896.

Jaishi Ram, for appellant.

Herbert, for respondents.

The judgment of the Court was delivered by

CLARK, J.—Plaintiff in order to succeed in his suit for pre-emption must show that he became a proprietor under the deed of 17th June 1894. 8th Novr 1898.

The first question for decision then is whether this deed is a sale, or only a contract for sale.

Both Courts have found that the deed is only a contract for sale; and after a careful consideration of the terms of the deed we think that they are right.

The words "*muahada bai*" and "*sauda farokht*," we think, refer to a contract for sale and not to a sale, and so do the words at the end "*lihaza ikrar-nama likh diya ke sanad ho*."

In para. 2 the vendor undertook to satisfy plaintiff further as to vendor's title to part of the property, and the evidence shows that it was because plaintiff was not quite satisfied with

the title that a deed of sale was not then executed. The vendor undertook to execute a deed of sale, and that if he did not within three months plaintiff might sue for specific performance.

The deed was only stamped with Re. 1 as a contract for sale, and not as a sale.

The payment of consideration does not necessarily imply that the deed was a sale: consideration might be paid for a contract to sell.

We find that the deed of 17th June 1894 was a contract for sale and not an actual sale.

It is then argued that on the principle of equity which considers that done which ought to be done, and which the Court can compel to be done, plaintiff became equitable owner of the property under the contract for sale, without obtaining any deed of sale. This appears to be the English law on the subject. Even though a person, who has contracted to sell land, becomes trustee for the intended vendee, this may be the relation established as between the parties to the contract for sale without making the intended vendee proprietor with reference to third parties.

As regards the law in India, Section 54 of the Transfer of Property Act is clear that a contract for sale of immoveable property does not, of itself, create any interest in or charge on such property.

Though this Act is not in force in the Punjab, it represents generally the law in force in India, and no decisions have been quoted which show that in the Punjab title passes under a contract to sell.

I. L. R., XI All., 244, was quoted, but we think this is against plaintiff. Mr. Justice Mahmud there says: "I regret, however, with due respect, I am unable to follow that ruling (*I. L. R.*, III All., 77), for it seems to me to proceed upon dis-regarding the distinction between a *contract of sale* and a *contract to sell*, the former being an executed contract, and the latter appertaining to the class of executory contracts, or to use the technical language of jurisprudence, sale creates a *jus in rem*, as it passes ownership immediately when it has been executed; and a contract to sell is a *jus ad rem*, for it only creates an obligation attached to the ownership of property, and does not amount to an interest therein."

Then under Section 27 (b) of the Specific Relief Act plaintiff would have had no claim to the land if the vendor had, subsequent to the contract to sell, sold the property to a third person without notice of the contract to sell, for value.

Again though under English law the intending vendee would have to bear the risk of loss to the property, under Indian Law the intending vendor would have to bear the loss (*Vide* Shepherd's Transfer of Property Act, 2nd Edition, page 186). We hold then that plaintiff did not become a proprietor under the deed of 17th June 1894 and we dismiss the appeal with costs.

Appeal dismissed.

No. 66.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

SADHU RAM AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MUSSAMMAT BAINI BAI AND OTHERS,—
(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 787 of 1895.

Punjab Courts Act, 1884, Section 40—Questions of law involved—Burden of proof—Construction of deed—Contradictory finding by lower Appellate Court—Material irregularity.

Held, that the proper allocation of the burden of proof and the construction of a deed which merely affected the parties to the suit and concerned no one else, were not "questions of law involved in the case" within the meaning of Section 40 of the Punjab Courts Act, 1884.

No. 45, *Punjab Record*, 1894, and No. 63, *Punjab Record*, 1897, followed.

It was further contended, on behalf of appellant, that inasmuch as the Divisional Judge had held that Article 127 of the Limitation Act was applicable to the case, his subsequent finding that the property in dispute was not "joint family property" amounted to an error of law or, at least, to a material irregularity within the meaning of Section 622 of the Civil Procedure Code.

Held, that, even upon the assumption that such findings were erroneous and contradictory, they would not amount to "questions of law involved" within the said section of the Punjab Courts Act.

Held, further, that all that was decided by the Divisional Judge was that, if the allegations in the plaint were correct and the property were to be held to be "joint family property," then under these conditions Article 127 of the Limitation Act would be applicable, and that this did not amount to holding that the property was in fact "joint family property," so as to throw the burden of proving that it was not on the other side, or preclude

the Court from finding on the merits that it was not in fact "joint family property."

It not being contended that the parties were members of a joint Hindu family, and it being admitted that all the house property other than that in dispute had been partitioned though some property consisting of agricultural land was still held jointly, *held*, that the burden of proving that the property in dispute was joint family property was at the outset rightly placed on plaintiffs, and that there was nothing in the findings of the Divisional Judge as above explained which shifted the burden to the other side.

Held, therefore, that the Divisional Judge had not acted with material irregularity in dismissing plaintiffs' claim on the ground that they had failed to discharge the *onus* which rested on them.

Further appeal from the order of Captain C. S. Martindale, Divisional Judge, Mooltan Division, dated 3rd May 1895.

H. Rattigan and Lal Chand, for appellants.

Grey, for respondents.

The judgment of the Court was delivered by

10th Novr. 1898.

GORDON WALKER, J.—This is a certificate appeal and the Divisional Judge has granted the certificate on one ground only, *viz.*, "that there is a question of law involved, namely, "on whom the *onus probandi* was." It has, however, been held by the Court (*Punjab Record*, No. 45 of 1894 followed in *Punjab Record* Nos. 68 of 1897 and 41 of 1898) that the proper allocation of the burden of proof is a question incidental to the proceedings and not a question of law involved in the case within the meaning of Section 40 of the Punjab Courts Act, and we see no reason to dissent from that ruling. It is, however, argued for plaintiffs (appellants) that there are other questions of law involved in the case (the application to the Divisional Judge for a certificate did in fact set out other grounds, though the Divisional Judge selected what was certainly the wrong one), and if it were established that there are other "questions of law involved" within the meaning of Section 40, we should be prepared to hear the case as a further appeal.

The first of the other grounds taken is that the Divisional Judge has put a wrong construction on the deed of 1861, holding that it operated only as between two of the defendants and not as between the two branches of the family. The meaning of the words "question of law" was considered in the second of the two judgments quoted above (*Punjab Record*, No. 68 of 1897), and, attaching to the words the meaning that they were there held to have, we are unable to find that this

would be a "question of law" within the meaning of Section 40. The question of the construction of this particular deed is one that merely affects the parties to the suit, and cannot be held to concern any one else, or to be of general interest.

The other point taken with reference to the further appeal is that if Article 127 of the 2nd Schedule of the Limitation Act is applicable to the case as the lower Courts have held, that was equivalent to holding that the property was "joint family property." It is urged that the Divisional Judge has come to a contradictory finding when he goes on to hold that the property is not in fact joint. Here again we are unable to see, even if there were anything in the contention, that this would be a question of law within the meaning of Section 40, and, as will be noticed presently, the argument admits of an easy answer.

The second part of the case put forward for plaintiffs is that there have been material irregularities which would justify the Court interfering under Section 622, Civil Procedure Code. It is urged that the lower Appellate Court has committed a material irregularity in wrongly adjusting the burden of proof, and, as incidental to this, the argument with reference to Article 127, which has been noticed above, is put forward. It is contended that the plaintiffs have been prejudiced by these irregularities, and that the case is one in which the Court should exercise its power of revision. It is further contended (1) that the Divisional Judge has not taken notice of the other documents on the file, and (2) that even on the finding plaintiffs should have got a decree against Tula Ram, who admitted plaintiffs' claim.

The last two points may be disposed of by referring to the order of the Divisional Judge on review (dated 18th June 1895), which shows that the Divisional Judge did take into consideration the documents and the admission of Tula Ram. As regards the argument founded on Article 127, it is a sufficient answer that all that was decided in the lower Courts was this, that if the allegations in the plaint are correct and the property were to be held to be "joint family property," then under those conditions Article 127 would be applicable. That certainly does not amount to holding that the property is in fact "joint family property," so as to throw the burden of proving that it is not on the other side.

It is not contended for plaintiffs that they and defendants are members of a joint Hindu family. It is further admitted

that the house property other than that in dispute has been partitioned, while some property consisting of agricultural land is held jointly. No presumption in favour of plaintiffs could be drawn from these circumstances that the property in dispute is joint ancestral property, so as to throw the burden of proving that it is not on the defendants at the outset, therefore the burden was rightly placed on the plaintiffs. Then the Divisional Judge finds that the deed of 1861 does not prove that the property was then joint. We are not concerned with the correctness of that decision, for at most the Divisional Judge could only be held to have come to an erroneous decision on the point. On his finding there could be no question of shifting the burden to the other side. Granting, therefore, for the sake of argument, that this would be a ground for interference under Section 622, we are unable to find that the Divisional Judge has acted with material irregularity.

We hold therefore that plaintiffs must fail under Section 622 as well as under Section 40 of the Punjab Courts Act, and we reject the petition.

Application dismissed.

No. 67.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

IBRAHIM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

APPELLEE SIDE. }

Versus

MUSSAMMAT FATIMA AND ANOTHER,—(DEFENDANTS),
—RESPONDENTS.

Case No. 626 of 1896.

Custom—Alienation—Gift by widow in favour of daughter married after death of widow's husband—Khanadamadi—Gujars of Gujrat—Rivaj-i-am.

In a case in which the parties were Gujar of Gujrat District, found that the right which a landowner has to make his daughter and her issue heirs in *Khanadamadi* cases cannot be extended in favour of such landowner's widow, and that the widow is not entitled by custom to gift her late husband's land to her daughter.

Further appeal from the order of A. Christie, Esquire, Additional Divisional Judge, Jhelum Division, dated 14th April 1896.

Parkash Chand, for appellants.

The judgment of the Court was delivered by

CLARK, J.

11th Nov. 1898.

Abdulla (died in 1892) married Mussammat Fatima, defendant No. 1.

Mussammat Aisha, defendant No. 2, married Karam Ilahi.

Plaintiff, a collateral of Abdulla in the fourth degree, sues for a declaration that a gift of land, dated 10th August 1895, by defendant No. 1 to defendant No. 2 shall not affect his reversionary rights.

The parties are *Gujars* of Gujrat. Mussammat Aisha was not married till after Abdulla's death, and though since her marriage Mussammat Aisha and her husband have been living with Mussammat Fatima, this does not entitle defendant to derive any advantage from the custom in favour of *khanadamad* in the Gujrat District. It is the proprietor himself and not his widow who can make his son-in-law a *khanadamad*. Defendants rely upon the custom stated in the *Riwaj-i-am*.

"The widow cannot, as a rule, alienate by deed of gift or by will the estate of her husband, unless she is advanced in years, and there is no likelihood of re-marriage. Under the latter circumstances she can transfer by gift to any male member of her husband's family, or to a descendant of her daughter under whose care she lives. The transferee will be answerable for her maintenance."

Mussammat Fatima is before us, and does not seem to be more than 40 years of age. Mussammat Aisha has no children, and the gift is to her, and not to her children.

This entry in the *Riwaj-i-am*, therefore, does not strictly apply to the case, but even if it did, we do not think it would be sufficient to prove a custom so opposed to the ordinary right of the widow. The other evidence in support of this custom is in our opinion worthless.

Captain Davies on page 3 of his Customary Law of Gujrat discusses the question, and says that such a transfer by a widow would probably require the sanction of her husband before death. He quotes *Punjab Reccord*, No. 43 of 1883, and No. 128 of 1884, which support this view.

It was alleged by defendant that Abdulla on his death-bed gave directions to this effect, but we do not accept this as proved.

We do not see that there is anything to warrant the extension to his widow of the right, which a landowner has, to make his daughter and her issue heir in *khanadamadi* cases.

And we do not think that a custom is proved allowing the widow to gift her husband's land to her daughter. The general custom and the exceptions are given under para. 64 of Rattigan's

Digest. The exceptions are generally among tribes influenced by Muhammadan law—*Sayads*, and *Pathans* and *Kakezais*.

We accept the appeal, and decree declaring that the gift of 10th August 1895 shall not affect plaintiffs' reversionary right after the death of defendant No. 1, and costs throughout.

Appeal allowed.

No. 68.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

RUKAN DIN, MINOR, THROUGH GHULAM, AND
OTHERS,—(DEFENDANTS),—APPELLANTS,

APPELLATE SIDE {

Versus

MUSSAMMAT MARIAM AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 652 of 1896.

Custom—Succession to childless proprietor—Exclusion of near collaterals by proprietors of village—Village founded within boundaries of old village—Right of collaterals residing in latter to succeed to land in former—Succession of adopted son in his natural family—Riwaj-i-am.

In the present case it appeared that *mauza Ferozabad* had been founded by the grandfather of the two deceased proprietors, the succession to whose lands was in dispute, within the boundaries of *mauza Rania*. The two proprietors having died childless, the proprietors of *mauza Ferozabad* claimed to exclude the near collaterals who lived in *mauza Rania*, and based their claim on an entry in the *Wajib-ul-arz* to the effect that on the death of a landowner without issue his near collateral should succeed provided he lived in the same *patti*; otherwise the landowners of that *patti* should succeed. There was no such entry in the *Wajib-ul-arz* of *mauza Ferozabad*, but it was contended that the entry in question applied equally to that village inasmuch as it had been founded from the other.

Held, that the said entry was very unusual and not very reasonable, and should not, therefore, be extended to *mauza Ferozabad* so as to give the proprietors of that village a preferential right over the near collaterals.

Held, further, that the decision of the Court in No. 64, *Punjab Record*, 1893, did not apply to the present case, inasmuch as the founder of *mauza Ferozabad* did not go and acquire land in a remote village but merely assisted in founding a new village within the boundaries of his old village, and also because the collaterals, as descendants of the founder, were claiming property which, so far as they were concerned, was ancestral property.

Held also, as regards the conflicting claims of the collaterals *inter se*, that an adopted son and his descendants are entitled to succeed in the natural family of such adopted son.

*Further appeal from the order of Sardar Gurdial Singh, Mah,
Divisional Judge, Ferozepore Division, dated 9th April 1896.*

Oertel, for appellants.

Golak Nath, Krishen Singh and Lajpat Rai, for respondents.

The facts of the case sufficiently appear from the judgment of the Court delivered by

CLARK J.

25th Novr. 1898.



The properties of Ismail and Khalil were held by their respective widows. Ismail's widow, Mussammatt Bakhto, recently died, and the property was mutated in the name of Mussammatt Mariam, widow of Khalil; thereupon the descendants of Wazir brought a suit for possession of the estate against Mussammatt Mariam and the sons of Jamal, for possession of the property held by Mussammatt Bakhto.

The sons of Jamal stated that they excluded the sons of Wazir, alleging that Jamal was the son of Mansur.

While this suit was pending, the proprietors of *manza* Rerozabad instituted a suit against all those parties for a declaratory decree that they, on the death of Mussammatt Mariam, were entitled to succeed to the whole of the estate of Bhana.

The first Court dismissed the claim of the proprietors and held Jamal was the son of Mansur, and that Jamal's sons excluded the descendants of Wazir, and dismissed the suit of the descendants of Wazir.

The Divisional Judge held the right of the proprietors established and decreed their claim. Though he held that Jamal was the son of Isa and not of Mansur, yet he dismissed the appeal of the descendants of Wazir, apparently weighing their claims with those of the proprietors, who were not as a matter of fact parties to their suit.

We will first discuss the claim of the proprietors. The estate is situated in *mauza* Ferozabad, which was founded out of *mauza* Rania. In the *Wajib-ul-arz* of Rania there is an entry that if a landowner dies without issue then his near collateral shall succeed, provided he lives in the same *patti*, but if he does not live in that *patti*, that the other landowners of that *patti* shall succeed. There is no such entry in the *Wajib-ul-arz* of Ferozabad, but the proprietors urge that the entry of Rania should be applied to Ferozabad, as the one is founded from the other. We are unable to accept this contention. The proviso of the Rania *Wajib-ul-arz* is a very unusual one, and apparently not a very reasonable one. There is no apparent reason why living in a different *patti* of the same village should exclude a near collateral. This entry may have been due to some peculiar circumstances of Rania, such as feuds between the different *pattis*. There are no *pattis* in Ferozabad, and it seems to have been founded by a body of near relatives.

We therefore think that there is no special agreement applicable to Ferozabad which would give a preferential right to the proprietors over the near collaterals.

The Divisional Judge has further held, following *Punjab Record*, No. 64 of 1893, that the collaterals cannot succeed to a collateral in a different village.

This case is very different from that case. *Mansur* did not go and acquire land in a remote village; he only assisted in founding a new village within the boundaries of his old village.

Another essential difference is that, as we shall show directly, the sons of *Jamal* are descendants of *Mansur*, who acquired the property, and what they are claiming is therefore ancestral property as far as they are concerned.

We hold therefore that the proprietors failed to establish their claim to this property.

The next question is the competing rights of the sons of *Jamal* and those of the descendants of *Wazir*. These depend on the question whether *Jamal* was the son of *Mansur*.

We think that *Jamal* was the natural son of *Bhana* and was adopted by *Isa*. Even the witnesses for *Wazir's* descendants say that *Jamal* was only the adopted son of *Isa*.

An inspection of the *kursinama* of the 1856 Settlement strongly supports this view: we think that *Jamal* is there

intended to be shown as the son of Bhana, and that Isa is probably put in between in a small circle to allude to the adoption.

The rulings of this Court are to the effect that an adopted son succeeds in his natural family.

The sons of Jamal therefore entirely exclude the descendants of Wazir, and the suit brought by the descendants of Wazir must be dismissed.

This appeal is accepted, and the suit of the proprietors is dismissed with costs throughout.

Appeal allowed.

No. 69.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

MUGHAL,—(PLAINTIFF),—APPELLANT,

Versus

} APPELLATE SIDE.

JALAL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Case No. 466 of 1896.

Pre-emption—Sale to two co-sharers and a stranger—Subsequent acquisition of stranger's share by third co-sharer—Suit by a fourth co-sharer for pre-emption.

The land in suit was in the first instance sold to three persons, of whom two were co-sharers in the joint holding but one was not. Subsequently plaintiff, who was also a co-sharer in the said holding, sued for pre-emption in respect of the sale, but shortly before the institution of his suit, the stranger vendee sold his share to one K. O., another co-sharer in the same holding. Accordingly at the time when the suit was instituted, the land was in the hands of three vendees against no one of whom plaintiff could assert a superior right. It was, however, contended on behalf of plaintiff that regard must be had to the original transaction in which two vendees, who had equal rights with plaintiff, had joined with them in the purchase a third whose right was inferior to that of plaintiff, and that the right of pre-emption which plaintiff would in consequence have had as against the original vendees could not be defeated by the subsequent elimination of the stranger and the substitution of a person against whom plaintiff had not a superior right.

Held, overruling the said contention, that the mere fact that at one stage a stranger had a share in the bargain could not be held to vitiate the right of the three persons who were the vendees at the date of suit and resisted plaintiff's claim with one that was not inferior to his own.

Further appeal from the order of D. C. Johnstone, Esquire, Divisional Judge, Jhelum Division, dated 1st April 1896.

Lal Chand, for appellant.

K. P. Roy and Ishwar Das, for respondents.

15th Novr, 1898.

The judgment of the Court was delivered by

GORDON WALKER, J.—The land in suit was in the first instance sold to three persons (1) Sainditta, (2) Sahibditta and (3) Devi Dial for Rs. 1,500. Of these (1) and (3) were already co-sharers in the joint holding, but (2) was not, so that if this suit were one brought by plaintiff to enforce his right of pre-emption as a co-sharer in the holding, against the three original vendees he would necessarily have succeeded, because the right of one of them was inferior to his. But before the institution of plaintiff's suit Sahibditta had transferred by sale his share of the bargain to one Karam Chand, who was also a co-sharer in the holding, and to whom plaintiff has no superior right. Thus when the suit was instituted the land was in the hands of three vendees against no one of whom plaintiff can assert a superior right. So far there is no dispute. (1) It is argued in the first place for plaintiff that we must look to the original transaction, in which two vendees, who had equal rights with the plaintiff, joined with them in the purchase a third whose right was inferior to that of plaintiff, and that the right of plaintiff could not be defeated by the subsequent elimination of the stranger and the substitution of a person against whom plaintiff had not a superior right. (2) It is further argued that having regard to the details of the transfer by Sahibditta to Karam Chand this was not a *bond fide* transaction, and we are referred to the remarks made by Mr. Justice Rivaz, in the judgment published as a foot-note to *Punjab Record*, No. 30 of 1893, beginning with "Before dealing with this question, &c." As regards this second point, it may be observed that the deed of sale by which Karam Chand took the place of Sahibditta was executed two days before the institution of plaintiff's suit, and it might perhaps be inferred from this that the transfer was made while the suit was being threatened and in view of its institution. But plaintiff did not in either of the lower Courts directly attack the genuineness of the transaction, the question was never put in issue, and it cannot be said to be raised in the grounds of appeal either to the Divisional Judge or to this Court. We do not therefore think that it is open to us to go into it now.

It may be taken, then, that this transaction (the sale by Sahibditta to Karam Chand) was a genuine one, and, that being so, Karam Chand may be held to have acquired the share of Sahibditta by coming forward and asserting his superior right of pre-emption. He might no doubt have asserted his

right to take over the whole bargain on the ground that the other two vendees could not oppose him because they had associated Sahibditta, a stranger, with themselves. He was content, however, to take only Sahibditta's share of the bargain, leaving the other two undisturbed.

The present case is clearly distinguishable from that in *Punjab Record*, No. 106 of 1880. There the sub-purchaser took only part of the bargain, but *left the rest with an original purchaser whose right was inferior to that of the person claiming pre-emption.*

In that case the learned Judge remarked that the sub-purchaser "must be held to be estopped from asserting the right he has once waived of acquiring the property solely against another person whose claim to pre-emption, though inferior to his own, is still superior to that of the first purchaser." In that case the right of the sub-purchaser was held to be vitiated because he had *allowed another person who had a right inferior to plaintiff's to retain part of the bargain.* We think that this judgment taken with *Punjab Record*, No. 10 of 1884, goes no further than to establish this principle that, when a right of pre-emption is claimed against several purchasers, the measure of their rights is to be taken to be that of the purchaser who has the lowest right, so that, if a claimant can show a right superior to that of *any one* of several joint-purchasers, he must succeed. In *Punjab Record*, No. 138 of 1884, another principle was established that, where a purchaser has acknowledged privately the right of a person to pre-emption of his purchase and has transferred it to him, a third person not having a superior right to the sub-purchaser (although his right is superior to that of the original vendee) cannot succeed against the sub-purchaser. It is clear that the remarks of Mr. J. Powell in that judgment with reference to *Punjab Record*, No. 106 of 1880, concern only the view of the case expressed above, *viz.*, that the sub-purchaser had vitiated his right by allowing a person *with claims inferior to the plaintiff to remain associated with him in the bargain.*

The question that really arises in the present case has not apparently yet been decided by this Court directly in any other so far as we are aware. The Divisional Judge has decided it on the analogy of *Punjab Record*, No. 138 of 1884, extending the principle therein laid down to it. The question which we have to decide under this head of the case may be stated to be as follows:—The sub-purchaser (Karam Chand) had admittedly a good claim against the three original purchasers,

because one of them had a right inferior to his. He did not enforce it against them all three by taking over the whole bargain, but contented himself with taking over a share and allowing the two original purchasers as against whom plaintiff has not got a superior right to remain in. There was a flaw in the right of the three original purchasers, has that been mended by the transfer of the stranger's part of the bargain to the sub-purchaser? We think that the answer must be in the affirmative. If Sainditta, Devi Dial and Karam Chand had been the original purchasers, plaintiff would have no claim against them, and it is equally true, we think, that if Karam Chand had taken over the whole bargain and re-transferred two-thirds of it to Sainditta and Devi Dial, plaintiff would in that case also have failed. The fact that at one stage a stranger had a share in the bargain cannot, in our opinion, be held to vitiate the right of the three persons who are now vendees, and resist plaintiff's claim with one that is not inferior to his. It cannot be properly contended that Karam Chand merely took the position of the stranger in the bargain and can claim no better right than that derived from him. The position that he took was in virtue of his right as a pre-emptor to whose superior right the stranger had yielded. Nor is there any force in the contention that the two original vendees who remained in waived their right as against the plaintiff by having admitted a stranger. No doubt plaintiff obtained a cause of action against the three original vendees on the first sale, but the same may be said where there is a sale to a single stranger vendee who subsequently transfers to a person having an equal right with the plaintiff. To admit the argument which it is sought to found on that would be to strike at the root of the principle on which the decisions of this Court are founded. On this point *I. L. R.*, XX *All.*, page 101, in which the Allahabad High Court has accepted the same view as this Court, may be referred to. It is true that in *Punjab Record*, No. 94 of 1895, the learned Judge (page 451) speaks of a sale where strangers have joined as being "bad in its entirety against plaintiff." But that case also is distinguishable from the present one by the fact that the strangers were allowed to remain in. We hold that the right of the three defendants was not injured by the failure of Karam Chand to impeach the sale so far as the two remaining original purchasers were concerned, and that they did lose their right by the association of a stranger with them in the original bargain.

In this view of the question, *Punjab Record*, No. 94 of 1895, has no bearing on the matter, nor is it necessary to discuss the other points raised except that taken in the fourth ground of appeal to the Divisional Judge (which is covered by the sixth ground of appeal to this Court). The question of custom (fifth ground in appeal to Divisional Judge) was not referred to in the arguments before us. The other point, *viz.*, the right of plaintiff to share in the bargain (*Punjab Record*, No. 54 of 1882) as having equal rights with the vendees, was not taken in the first Court and was apparently not pressed before the Divisional Judge. The ruling quoted is totally inapplicable to the present case. It was there held that *in the circumstances of that case* "the right of pre-emption was a joint right of the plaintiff and the purchaser, and by buying a share he has "exercised their rights as well as his own." It cannot be seriously argued that there was any community of interests between the plaintiff in this case and the vendees, or generally that a purchaser must be held to take on behalf of all persons who have an equal right of pre-emption (with him) in the property. See *Punjab Record*, No. 17 of 1884, on this point.

For these reasons we think that the appeal must fail, and we dismiss it with costs.

Appeal dismissed.

No. 70.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

UMAR BAKHSH,—(PLAINTIFF),—APPELLANT,

Versus

ABDUL KARIM AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 491 of 1896.

Pre-emption—Claim in respect of land situate in out-growth of town of Batala and occupied by shops—Onus probandi.

Plaintiff sued for pre-emption of certain land which, though formerly agricultural, was at the date of suit situate in an out-growth of the town of Batala, and was occupied by business premises, or shops, and not by dwelling-houses.

Held, that the claim must be treated as one in respect of property which, though formerly agricultural land, should now be regarded as subject to urban rules.

Held, therefore, that the burden of proving that there was a custom of pre-emption applicable to such property was upon plaintiff, and found, that plaintiff had failed to relieve himself of such onus.

No. 87, *Punjab Record*, 1890, followed.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 23rd March 1896.

K. P. Roy, for appellant.

Lal Chand, for respondents.

The judgment of the Court was delivered by

2nd Decr. 1898.

GORDON WALKER, J.—The property which is the subject of this suit is situated just outside the town of Batala, beyond the original limits of the town which are defined by the circular road. The town is gradually spreading out, and land which has formerly been cultivated is being taken up for building sites, mostly for shops and business premises (*kur-khanas*). This is clearly what has happened in respect of the land in dispute. It has been built over; and the first question for consideration is whether, for the purposes of this suit, we are to regard the land as subject to the rules of pre-emption which apply to urban areas or as agricultural land. The same question arose in the case in which the judgment is reported as *Punjab Record*, 87 of 1890, the site in dispute there being portion of another out-growth of Batala. In that case Mr. Justice Benton observed “it appears to us that we ought to regard the “property as situated in a town, it being a suburb in immediate proximity to a large town and occupied by shops, a grain “market and such like buildings used for commercial purposes, etc., etc.” We have no hesitation in accepting the view expressed by the learned Judges in that case, and in holding that plaintiff’s claim is to be dealt with in accordance with the rules applicable to urban areas.

That being so, it remains to consider whether plaintiff has established the existence of a custom of pre-emption applicable to the site in dispute: granting as we may, at least for the sake of argument, that there may be a well-established custom of pre-emption applicable to sites within the original limits of the town, can it be deduced from this that the same custom would apply to the areas under out-growths of the town, or has plaintiff otherwise proved the existence of a custom that would so apply? We think that the reply to both questions must be in the negative.

The right of pre-emption is an interference with the rights of property which is justified by certain considerations. In the case of village lands its object may be taken to be the exclusion of strangers, and the maintenance of the village community in its integrity. Here the considerations are regarded

as of such force that the custom is presumed to exist. In the case of sites in towns there is no such presumption; but it is recognized that there may be circumstances which would justify the interference in respect of them also, and it is open to the party claiming pre-emption to prove the existence of a custom.

There is one point of importance in this case that does not seem to have been brought out with sufficient clearness. The first Court has found, and it is clearly right here, that "the site in suit is on the new *abadi* formed outside the town of Batala for the purpose of starting workshops..... These houses have been built for the manufacture of iron *belnas* (sugarcane presses)." Also "the site in dispute is a new *abadi* formed for the purposes of trade in iron *belnas* (sugarcane presses)." It is clear that what we are dealing with are not dwelling-houses, but business premises, in fact *shops* not *houses*.

As regards the rulings of this Court which have been quoted in the arguments, *Punjab Record*, No. 87 of 1890, has already been referred to. That ruling is very much in point. It was held that the plaintiffs had in that case failed to establish a custom of pre-emption in the *Tahsilwala bazar*, another out-growth of Batala. It does not appear to us to constitute a material difference between the two cases that the *Tahsilwala bazar* was a little way off from the original town, while the area in dispute is only separated from the town by the circular road. No. 17 of 1889 was a case relating to *houses* inside the town of Batala; but the only question really involved was as to which of two claimants, owners of adjoining houses, had the superior right. The right of pre-emption founded on vicinage as regards *houses in the town* was apparently not disputed.

Punjab Record No. 49 of 1889 was also referred to; but it has really no bearing on the present case.

Punjab Record, No. 103 of 1889. This case is on the face of it easily distinguishable from that now before us; but there are some portions of the judgment that may be quoted as showing the principles on which the decision in such a case should be based. "It cannot be doubted," remarked Mr. Justice Powell, "that the object and purpose for which the right of pre-emption was recognized and enacted in Act IV of 1872 was "to protect the compactness of village communities, and in towns to respect native feeling as regards caste exclusiveness

“the seclusion of private family life and so forth; not to interfere with private rights of contract or the disposal of property. It has not, however, been so limited in the Act that the right can only be exercised when some consideration connected with caste seclusion, re-union of divided tenements, or convenience regarding privacy.....is established.” Elsewhere in the same judgment the following passage occurs:—
 “We do not wish to lay too much stress on the fact of plaintiff’s premises being mere *shops*, but it is indisputable that it does not follow that because in a sub-division pre-emption is the custom in parts occupied by dwelling-houses, therefore it holds good for those occupied by shops.....”

Punjab Record, No. 170 of 1889, related to a site in *Mohalla Sultan Ganj*, a suburb of *Mooltan*. In the judgment in that case it was observed: “It is admitted that it (the custom of “pre-emption”) prevails generally within the city of *Mooltan* and that, as a general rule, where pre-emption is found to prevail within some sub-divisions of a city it may be presumed, unless the contrary is shown to prevail in others also. But it is contended that this applies only to the city proper, and that where a suburb has grown up as it were independently and is not a mere growth of the city itself, those who assert that pre-emption exists in it must prove their assertion. The view appears to be generally correct and to be applicable to the present case.” (Roe, J.) These facts are no doubt distinguishable from those of the present case where the site in dispute may be said to be “a mere growth” of the town of *Batala*. But it is not to be inferred that the learned Judge meant to convey that, if the suburb had been “a mere growth” the presumption would have been in favour of the existence of a right of pre-emption. It would no doubt be easier to prove the existence of the custom in a “mere growth” than in an “independent” suburb; but distinct proof would be necessary in the former case also.

Punjab Record, No. 199 of 1889 may be taken as showing that the customs of pre-emption as regards houses prevails in the town of *Batala*.

In *Punjab Record*, No. 17 of 1895, the distinction between claims in respect of shops and in respect of dwelling-houses is emphasized. This was held to have “a substantial foundation in the social usages of the country, such as privacy of women and compactness of family or tribal residences, exclusion of out-

“siders, convenience of neighbours and the like, which underlie
“the custom, and has been clearly accentuated in the recent deci-
“sions of this Court. The character and uses of the two classes
“of property are totally different, and evidence of the right
“existing in respect of houses may be relevant, but is very
“feeble evidence of its application to shops. We concur with
“the later authorities of this Court that it is not sufficient for a
“plaintiff to show that the right extends to a house in a parti-
“cular portion of a town, and that *it must be affirmatively shown*
“*to extend to shops, &c.*”

As regards the unreported case No. 522 of 1879, quoted by the lower Appellate Court, it cannot be said that this helps plaintiff much. The decision in that case proceeded on other grounds, and the questions which arise in the case now before us were not directly raised, if, indeed (see Mr. Justice Brandreth's judgment), the defendants did not actually admit the existence of a custom founded on vicinage.

The first Court held that the plaintiff had a superior right to the defendant-vendee, because in a previous suit the latter succeeded in establishing his right of pre-emption in another plot on the grounds on which plaintiff now claim; but in that case also the decision proceeded on different grounds, the questions that we have to decide here not being raised.

The conclusion at which we arrive in the present case is that the claim is to be treated as one in respect of property which, though formerly agricultural land, must now be regarded as subject to urban rules. It was for plaintiff to prove that, the land being situated in an out-growth of the town of Batala, and being occupied by business premises or shops and not by dwelling-houses, there was a custom of pre-emption applicable to such property. We think that he has failed to establish this, and that his suit was rightly dismissed by the Divisional Judge.

This appeal is accordingly dismissed with costs.

No. 71.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

APPELLATE SIDE. }

DEVI DITTA AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

PAREMAN AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 814 of 1896.

Suit to contest validity of sale—Right of plaintiffs to attack mortgage made in favour of vendee more than 12 years before suit—Merger of mortgage in sale—Limitation Act, 1877.

In a suit in which plaintiff prayed for a declaration that a certain sale of land would not affect his reversionary rights, and it appeared that the said land had been mortgaged to the subsequent vendee more than 12 years before suit,

Held, that there was nothing in the provisions of the Indian Limitation Act of 1877 which prevented the plaintiff in such suit from attacking the said previous mortgage, and that it could not be held in a suit regarding the subsequent sale, that the title of the mortgagee had acquired validity by prescription.

But *held*, that there was a presumption, which had not been rebutted, that the mortgagee intended to keep alive the charge created by the previous mortgage-deed, and that it was not merged in the subsequent sale.

Held, therefore, that plaintiff was entitled to a declaration that the sale would not affect his reversionary rights, but that such declaration could not affect the rights of the mortgagee under the previous mortgage.

Further appeal from the order of Khan Muhammad Hayat Khan, C. S. I., Divisional Judge, Jullundur Division, dated 8th June 1895.

Jaishi Ram, for appellants.

The facts of the case sufficiently appear from the judgment of the Court delivered by

9th Decr. 1898.

GORDON WALKER, J.—The material facts of the case are the following. Raj Mal mortgaged the land in suit with possession to defendants for Rs. 100. After his death, his widow, Mussammat Jassi (defendant 1) on 7th March 1878 executed a bond in favour of defendants for Rs. 200, the money being required, it was stated, for the funeral expenses of her husband, and for her own subsistence. On 3rd December 1880 Mussammat Jassi mortgaged the land to defendants for Rs. 460, the consideration being made up of the Rs. 300 above and Rs. 160 interest. Finally on 10th April 1894 Mussammat Jassi sold the land verbally for Rs. 559, which included the Rs. 460

above, and another item of Rs. 99. Plaintiffs sue for a declaration that this sale shall not affect their rights as reversionary heirs of Raj Mal.

The first Court held that the sale of 1894 was fictitious, and declared it void as against plaintiffs. But with regard to the mortgage for Rs. 460, executed in 1880, it held that "though it had not been proved that the sum of Rs. 460 was raised for necessity, yet as the said deed was executed in 1880, and as plaintiffs did not bring a suit for cancellation thereof within the period of 12 years they cannot now raise an objection as to the validity of the said deed." A decree was accordingly passed which maintained the mortgage of 1880 as against plaintiffs.

On appeal by plaintiffs the Divisional Judge held that the suit was barred by limitation as regards the mortgage deed of 1880, and he dismissed the appeal on this ground. An application for revision (Section 622) was made to this Court, and Mr. Justice Stogdon in his order, dated 18th February 1896, remarked that plaintiffs' suit was with regard to the sale of 1894, plaintiffs not asking for any relief in respect of the mortgage of 1880, and that the Divisional Judge had neither discussed nor shown why the suit as laid should be barred by limitation. The case was remanded to the Divisional Judge for re-decision of the appeal.

The Divisional Judge has, in the judgment now appealed against, misunderstood Mr. Justice Stogdon's order, taking it to amount to a decision that the suit was not barred by time as regards the mortgage of 1880. Going into that mortgage, he then found that no necessity was proved for the alienation beyond the original Rs. 100, and he has accordingly reduced the charge on the land as against the reversioners to Rs. 100.

In the present appeal defendants ask that the order of the first Court should be restored, abandoning the sale of 1894, and falling back on the mortgage of 1880. With regard to the latter it is argued that it could not be called in question because 12 years had elapsed between its execution and the suit.

We think that the view of the law taken by the first Court as stated above is erroneous, and that in the present suit, which is in respect of the sale executed in 1894, it would be open to the plaintiffs, so far as the question of limitation is concerned, and without reference to other questions, to attack the mortgage of 1880, the consideration of which was included in that of the sale. On this point we are disposed to accept the

principle laid down by Mr. Justice Chatterji in his judgment in a case recently decided by this Court (*Punjab Record*, 55 of 1897). In that judgment the leading authorities were reviewed, and it was observed that "the law of limitation has for its "immediate subject judicial remedies only." It is further pointed out that Sections 5—25 of the Act deal with rules of limitation only, while Sections 26—28 deal with the acquisition or extinction of rights owing to the lapse of time. Further on the learned Judge observes:—"I should be disposed to hold "that none of the articles in the first division of the 2nd "Schedule of the Act, except those to which Section 28 can be "applied, has an extinctive operation on primary rights, *i. e.*, "has any other effect than that of merely barring the judicial "remedy."

We think that this principle is applicable to the question now being considered, and that there is nothing in the *provisions of the Limitation Act* which prevents the plaintiffs in the present suit from attacking the mortgage of 1880. It cannot in short be held (as the First Court did apparently hold) that in a suit regarding the subsequent sale the title of the defendants-mortgagees under the mortgage of 1880 has acquired validity by prescription under the Limitation Act.

But there is another view of the case that is put forward. It is argued that what was sold in 1894 was only the equity of redemption; and that, even if the sale be declared invalid as against the plaintiffs, the mortgage of 1880 will remain and cannot now be assailed by them.

The question that arises here is that of the merger of the mortgage charge of 1880 in the subsequent sale of 1894. The weight of authority on this point seems to be entirely in favour of the contention of defendant-mortgagees that the prior mortgage charge was kept alive. We may refer to *I. L. R.*, X *Calc.*, 1035, *XVI Calc.*, page 523, *XI Mad.*, page 345, and the question is fully discussed, special mention being made of the difference between the English and the Indian Law, in Ghose on the *Law of Mortgage in India* (Tagore Law Lectures), 2nd Edition (1889), Chapter XII, page 369, and in Macpherson, 7th Edition, pages 314-9. In *Punjab Record*, 38 of 1894, the question was between a second mortgagee and a third mortgagee, the latter having discharged, according to the stipulation in his deed, a first mortgage charge; but according to the authorities cited above, the same principle would apply to the present case, which is one of a mortgagee subsequently purchas-

ing. In the decision last quoted Mr. Justice Rivaz observed, referring to the decision of the Privy Council in *Gokal Das Gopal Das v. Puran Mul* (I. L. R., X Cal., 1035), a ruling that has also been quoted above, "it was held that as he (a subsequent purchaser) had a right to extinguish the prior charge, or to keep it alive, the question was what intention was to be ascribed to him, and that in the absence of evidence to the contrary, the presumption was that he intended to keep it alive for his own benefit. Applying that principle to the present case, we think that the presumption must be that Ghanaya (the purchaser) when he paid off Gainda Rai's mortgage, intended to keep alive the prior charge for his own benefit, and this presumption is strengthened by the terms of the deed in Ghanaya's favour, and in nowise rebutted."

Applying this principle to the present case we hold that there is a presumption, which has not been rebutted, that defendants intended to keep alive the charge created by the mortgage deed of 1880, and that it was not merged in the sale of 1894. This suit is for a declaration in respect of the sale of 1894, and plaintiffs have succeeded in respect of that, the decision on this point not being questioned on appeal to us. Plaintiffs are entitled to a decree in respect of the sale, declaring that it shall not affect their rights as reversioners: but this will not and cannot affect the rights of the defendants-mortgagees under the mortgage of 1880.

On the merits, too, as regards the mortgage of 1880, we are unable to agree with the Divisional Judge. Raj Mal mortgaged the land in his life-time, with possession of mortgagees, to the defendants-mortgagees. Presumably, therefore, he was in debt, and there was justification, in necessity, for the widow raising the subsequent loan of Rs. 200 for the purposes recited—Raj Mal's funeral expenses and her own subsistence. The defendants-mortgagees were justified in advancing her the money, and this, with the interest, was a legitimate charge on the property.

The result of our decision will be in effect to restore the decree of the first Court.

We accept the appeal, and set aside the order of the Divisional Judge. Plaintiffs' appeal to the Divisional Judge will stand dismissed, and the decree of the first Court be restored. Defendants 2—7 will get their costs in this Court and in that of the Divisional Judge.

Appeal allowed.

No. 72.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

JAGAN NATH, MINOR, THROUGH MUSSAMMAT LAL
DEVI, AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

Versus

TULSI DAS AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

Case No. 640 of 1896.

Hindu law—Liability of son for father's debt—Onus of proving that debt was incurred for immoral purposes—Minor son—"Antecedent debt," meaning of.

There being no reason why a minor son should not just as much as an adult son be under a pious obligation to discharge his father's debts, the *onus* of proving that a father's debts were immoral, when it is sought to set aside an alienation by the father, lies no less upon minor sons than upon adult sons, the former being in no better position than the latter.

In 1892 one G. C. mortgaged six houses to one T. D. for Rs. 5,500 by two deeds, and out of the consideration Rs. 3,000⁰ was for the payment of an antecedent debt and Rs. 2,500 was taken by G. C. in cash. G. C. then rented the houses from T. D. and executed leases to him. In 1894 T. D. brought two suits against G. C. for possession of the houses and obtained two decrees for possession with costs in the two cases amounting, respectively, to Rs. 329 and Rs. 327. On the 24th August 1895 T. D. executed the decrees for costs and attached the six houses, and further prayed that a sum of about Rs. 7,000 which was due to him under the mortgage-deed should be reserved and the houses sold, the proceeds being applied towards the satisfaction of the sums due on the decrees. The minor son of G. C. objected to the attachment, but his objection was dismissed. He accordingly filed the present suit on the 20th February 1896 for release of the houses from attachment, and it was contended on his behalf that G. C.'s debts were incurred for immoral purposes, and that the *onus* of proving that they were not so rested in this case upon T. D. because (a) the son was a minor, and (b) Rs. 2,500 of the original debt having been taken in cash by G. C. at the time of mortgage was not an antecedent debt.

Held, that the minority of the son was no reason why the burden of proof should be shifted from him.

Held, further, that inasmuch as there were decrees for Rs. 329 and Rs. 327 against G. C. at the time when plaintiff instituted the present suit, such decrees were antecedent debts which plaintiff was under a pious obligation to pay unless he could prove that they bore an immoral taint.

"Antecedent debt" means with regard to a mortgage a "debt antecedent to the transaction," and in the case of a proceeding by suit a "debt antecedent to the suit."

I. L. R., XX Calc., 328, followed.

As regards the contention that though the amounts of the decrees might be antecedent debts, yet that this did not apply to the whole of the mortgage-money due on the mortgages, *held*, that inasmuch as the decrees

for possession and the order in execution for sale of the houses subject to T. D.'s mortgages substantially charged the whole mortgage-money on the property, plaintiff in suing to set aside orders passed against him in furtherance of T. D.'s remedy for his debt, was attempting to set up his right against the creditor's remedy for his debt, which on the authority of *I. L. R., XIII Calc.*, 21, he could not be allowed to do.

Found, on the evidence, that plaintiff had failed to prove that the debts of G. C. were for immoral purposes.

*First appeal from the order of Rai Mul Raj, District Judge,
Lahore District, dated 7th May 1896.*

Jaishi Ram, for appellants.

Lal Chand, for respondents.

The judgment of the Court was delivered by

CLARK, J.—In 1892 Gyan Chand mortgaged six houses to Tulsi Das for Rs. 5,500 by two deeds. Out of the consideration Rs. 3,000 went to pay an antecedent debt to Narain Siugh, and Rs. 2,500 was taken in cash. 3rd Decr. 1898.

Gyan Chand then rented the houses from Tulsi Das and executed leases to him.

In 1894 Tulsi Das brought two suits against Gyan Chand for possession of the houses and got two decrees for possession with costs in the two cases amounting, respectively, to Rs. 329 and Rs. 327.

On 24th August 1895 Tulsi Das executed the decrees for costs and attached the six houses; he further prayed that the sum of about Rs. 7,000 which was due to him under the mortgage-deeds should be reserved and the houses sold and the proceeds be applied towards the satisfaction of the sums due on the decrees. The Court passed orders that this should be done under Section 295 (b), Civil Procedure Code.

Jagan Nath, minor son of Gyan Chand, and Mussammat Lal Devi objected to the attachment. Their objection was dismissed on 5th December 1895. They filed this suit on 20th February 1896, for release of the houses from attachment, Jagan Nath alleging that the debts were incurred for immoral purposes and Mussammat Lal Devi that she had a right of residence in and maintenance against the houses, and that they could not be attached in Gyan Chand's decree.

The District Judge held that plaintiffs had failed to prove that the debt was incurred for immoral purposes, that the purchasers of the property would, it appeared to him, take it subject to the wife's rights of maintenance and residence if there were no other property. He dismissed the suit.

Plaintiffs have appealed to this Court; their pleader has abandoned his appeal as far as it concerns the rights of the wife, as he is content with the judgment of the First Court as far as her right is concerned, so this appeal only deals with the rights of Gyan Chand's minor son, Jagan Nath.

It is not denied generally that if a son seeks to escape from having his interest in property alienated by his father sold, it rests upon him to show that the debt was incurred for immoral purposes; but it is argued that there are two reasons why the *onus* in this case should not be thrown upon plaintiff:—

- (1) Because he is a minor.
- (2) Because Rs. 2,500 of the original debt was not antecedent debt, but was taken by Gyan Chand in cash at the time of the mortgage.

As regards the first point. There is no reason why a minor son should not just as much as an adult son be under a pious obligation to discharge his father's debts.

We have consulted a vast number of cases of a similar nature to the present, and in none of them was it advanced that a minor son was as regards *onus* in a different position from an adult son. In many of these cases the sons were minors and the *onus* of proving immoral taint of debt was thrown upon them, *e.g.*, *I, L, R.*, XX *Calc.*, 328, and *XIII All.*, 216, *Bhattacharji's Commentaries on Hindu Law*, page 230, "says: With regard to the management of the family estate the "powers of the father who has infant sons cannot be less than "those of one whose sons are adults,"

In fact the converse of this proposition has been held: the Bengal Court has held that though such an alienation binds the minor it cannot bind adults without their consent, express or implied (*vide* *Mayne's Hindu Law*, 5th Edition, para. 286),

The question of *onus* is discussed on page 138 of *Tagore Law Lectures* of 1895-96, and it is stated that it is settled by a long course of decisions that the sons have to show that the debts were of an immoral nature, and in the absence of any evidence on the point the debt must be presumed to be of a character binding on the heirs; there is no limitation mentioned as regards minor sons.

We hold, therefore, that as regards the *onus* of proving that a father's debts were immoral when seeking to set aside an alienation by the father, the minor sons are in no better position than the adult sons, and the *onus* lies upon them.

As regards the next point, that Rs. 2,500 out of Rs. 5,500 was not an antecedent debt and that the *onus* lies upon Tulsi Das to prove that it was taken for legal necessity.

The meaning of "antecedent debt" is discussed on page 142, Tagore *Law Lectures*, 1895-96, and in *I. L. R.*, XX *Calc.*, 328, where it is held that antecedent debt means with regard to the mortgage "debt antecedent to the transaction," and in the case of a proceeding by suit "debt antecedent to the suit." We take it that antecedent debt in this case means debt antecedent to the suit. There were decrees for Rs. 329 and Rs. 325 against Gyan Chand when plaintiff instituted this suit; these were antecedent debts and plaintiff was under a pious obligation to pay them unless he could show that they bore an immoral taint.

Great reliance is placed by plaintiff's pleader on *Punjab Record*, No. 152 of 1888, where a distinction was drawn between an antecedent debt and a present loan, and it was held as regards the present loan that the mortgagee was bound to establish that the advance was made by him after a reasonable and fair enquiry that satisfied him, as a prudent man, that the money was required for the legal necessities of the family.

This question was considered by Mr. Justice Rivaz in *Punjab Record*, No. 33 of 1892. He there says: "As to the argument that the sons cannot be held liable for an undertaking not arising out of an antecedent debt, in absence of proof that the money was required for the legal necessities of the family, in which connection *Punjab Record*, No. 152 of 1888, is relied upon, it is sufficient to point out that the contention breaks down with reference to the particular facts of this case, and the true question for decision. But what we have now to deal with is the decree subsequently obtained against the father under his contract of guarantee, and the question is whether the whole of the ancestral property is liable to attachment and sale in execution of that decree. The decree was in my opinion undoubtedly obtained for an antecedent debt, and any sale which followed in execution would be in the nature of an involuntary alienation for a debt of that character. The above view renders it unnecessary to consider whether the broad distinction drawn in No. 152 of 1888 between alienations in consideration of a present loan and those for the payment of an antecedent debt can be supported in view of the more recent expositions of the law by the Judicial Committee."

The same distinction as is pointed out by Mr. Justice Rivaz in that case occurs also in this case. Here also there is a decree for costs against the father subsequent to the original mortgage, and that decree is a debt which at the time of instituting the suit plaintiff was under a pious obligation to pay.

But it may be urged that though the amounts of the decrees for costs may be antecedent debts, yet that this does not apply to the whole of the mortgage-money due on the mortgages.

In this connection we must remember that the decrees for possession and the order in execution for the sale of the houses subject to Tulsi Das's mortgages substantially charge the whole mortgage-money on the property.

In *I. L. R.*, XIII Cal., 21, their Lordships of the Privy Council said : " The decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or *the creditors' remedies for their debts*, if not tainted with immorality."

Plaintiff is setting up his right *against the creditor's remedy for his debt*, and he cannot be allowed to do this. It is clear on the authority of *I. L. R.*, XX Cal., 328, that if Tulsi Das were suing Gyan Chand and Jagan Nath for his debt on the mortgage-deeds the whole amount of the mortgage-money would be considered antecedent debt, and that Jagan Nath's property would be liable unless he could prove immoral taint on the debt.

There is no apparent reason why Jagan Nath should be in a better position when he comes into Court and seeks to set aside orders which have been passed against him in furtherance of Tulsi Das's remedy for his debt.

We, therefore, hold that even as regards the cash loan to Gyan Chand made at the time of the mortgage the *onus* lay upon plaintiff to prove an immoral taint on the debt.

It is then argued that it is proved that the debt was raised for immoral purposes. We have carefully considered the evidence on this point, and the rulings on the subject of what evidence is required on the subject. We think that the evidence is vague and meagre, and falls far short of proving that the money was raised for immoral purposes.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

No. 73.

Before Mr. Justice Reid and Mr. Justice Anderson.

MAHTAB-UD-DIN,—(DEFENDANT),—APPELLANT,

Versus

KARAM ILAHI AND OTHERS,—(PLAINTIFFS),—

RESPONDENTS.

} APPELLATE SIDE.

Case No. 1353 of 1896.

Pre-emption—Parties with equal rights of pre-emption—Liability of party who privately purchases from original vendor to be defeated by party who subsequently to such purchase sues original vendor and vendee for pre-emption.

A, having sold certain property, in respect of which X and Y had equal rights of pre-emption, to B, X privately purchased the said property from B. Subsequently to such re-sale, Y sued A and B for pre-emption.

Held, that X by his purchase from B had asserted his pre-emptive title in so efficacious a form as to be entitled to have his bargain secured to him against everyone not having a superior right of pre-emption.

No. 138, *Punjab Record*, 1884, and *I. L. R.*, XX *All.*, 100, *followed*.

Further appeal from the order of C. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 8th May 1896.

Muhammad Shafi, for appellant.

Jaishi Ram, for respondents.

The judgment of the Court was delivered by

REID, J.—The question for decision is whether the plaintiffs-respondents are entitled to possession by pre-emption of certain property in respect of which a deed of sale has been executed in favour of the appellant.

16th Jany. 1899.

Ghulam Muhammad sold one-third of a house to Ghulam Ghaus, who in turn sold it to the appellant, owner of another third of the house, the remaining third being owned by the plaintiffs.

The date of the appellant's sale deed is the 7th April 1894, and on the facts we see no reason to hold that the sale was not valid and contracted in good faith, or that the appellant and plaintiffs-respondents had not equal pre-emptive rights.

On the 4th May 1894 the plaintiffs sued for possession by pre-emption, making Ghulam Muhammad and Ghulam Ghaus parties, and, on the latter's statement that he had sold to the appellant, amended the plaint by adding the appellant as a defendant.

The pleader for the respondents contended that notice of suit had been served on the vendor and original vendee before

the 7th April 1894, but has been unable to support this contention from the record, and it is unnecessary to consider how far this service of notice, if proved, would affect the rights of the parties; 62 and 68, *Punjab Record*, 1879, and 83, *Punjab Record*, 1888, relied on by the pleader for the respondents, do not assist them. There is no question here of a pre-emptor having to take over the bargain of a purchaser from the original vendee, neither of whom had rights equal to that of the pre-emptor, or of the vendor and vendee cancelling their sale to defeat the pre-emptor, but the question is whether, where two persons have equal rights of pre-emption, he who purchases privately from the vendee has shown less diligence than, and can be defeated by, him who, subsequently to the purchase by the former, sues the original vendor and vendee for pre-emption. 138, *Punjab Record*, 1884, and *Serh Mal v. Hukam Singh*, I. L. R., XX All., 100, are authority against this proposition. It is contended that in the former case the private sale was to one with superior rights of pre-emption, and that to allow a pre-emptor to purchase privately, is to allow a vendee to choose which of rival pre-emptors should be allowed to purchase, and is opposed to the provisions of the Punjab Laws Act, which allow this choice only to the vendor.

We can find nothing in the Punjab Laws Act in support of the latter contention, while the principle laid down in 138, *Punjab Record*, 1884, applies to a pre-emptor with equal rights, and the Allahabad ruling is directly in point. In 83, *Punjab Record*, 1888, preference was given to the pre-emptor who first asserted his claim.

In the terms of the judgment of Tremlett, J., in 138, *Punjab Record*, 1884, we find that the appellant, by his purchase from Ghulam Ghaus, not only asserted his pre-emptive title, but asserted it in so efficacious a form as to be entitled to have his bargain secured to him against every one not having a superior right, and we decree the appeal and restore the decree of the Court of first instance, with costs here and below.

Appeal allowed.

No. 74.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

KUNDAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

*Versus*SUNDAR SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 393 of 1896.

Custom—Succession—Chundawand or Pagwand rule—Sindhu Jats of Bagiana Kalan, Chunian tahsil, Lahore District—Burden of proof.

In a case in which the parties were Sindhu Jats of Bagiana Kalan, Chunian tahsil, Lahore District, found, that plaintiffs, upon whom the *onus* rested, had failed to prove that in questions of succession the parties were governed by the *Chundawand* and not by the *Pagwand* rule.

Further appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 24th February 1896.

The judgment of the Court was delivered by

CHATTERJI, J.—Parties in this case are Sindhu Jats of Bagiana Kalan in the Chunian tahsil of the Lahore District. Plaintiffs are the grandsons of one Jowala Singh and sue their uncles and cousins, on the death of their grandfather, for one-half of his estate on the principle of *Chundawand* because their father Wadhawa Singh was the only son of Jowala Singh by one wife, the defendants being the descendants of the other wife. Jowala Singh appears to have divided his land among his sons for the purpose of cultivation without partition, and plaintiffs' father had about 14 *ghumaos* of land, which were nearly equal to his share by the rule of *Pagwand*. 16th Jany. 1899.

The defendants plead that *Chundawand* is not applicable to the parties but *Pagwand*, and this is the real question in dispute between the parties, the Courts below having rightly found that there was no final partition made by Jowala Singh among his sons, as is further asserted by defendants.

The First Court held that the rule of *Chundawand* governs the parties and gave plaintiffs the decree they asked for, but this was reversed by the Divisional Judge, who found that principle of division was *Pagwand*.

We have gone through the record and examined the precedent relied on by the First Court. The case decided by Munshi Kadir Bakhsh on 29th May 1882 was one from the village of Kanwin, which is not far from Bagiana Kalan, but is not in point. It was a suit between the descendants of one Jodh Singh by his two wives for division of the property left

by one Badan Singh, a collateral equally related to them, on the principle that the sons of Jodh Singh were entitled to equal shares. The defendants contended that they inherited Badan Singh's land according to the rule of *Chundawand*. The judgment of the Court of appeal proceeds mainly on the ground that the parties had partitioned the land on the latter principle through the Tahsildar by private arbitrators and that plaintiffs had agreed to the award and allowed mutation to take place. The Court also expressed an opinion that the *Chundawand* rule obtained among the parties, but Munshi Kadir Bakhsh had held that this was proved in respect of land inherited from collaterals and did not find that it prevailed in the case of lineal succession. Altogether this case appears to be wholly insufficient to prove the custom set up by the plaintiffs.

It is found by every-day experience and has been laid down in numerous rulings of this Court that the usual rule of division of ancestral property among sons and grandsons is *Pagwand*, and it therefore lay on the plaintiffs to prove that the rule of *Chundawand* governs the parties. The *Riwaj-i-am* of Sindhu Jats of *tahsil* Chunian of the Settlement of 1865-68, *vide* answer to question 131, says that *Pagwand* is the custom, and the Customary Law of Lahore prepared by Mr. G. C. Walker at the last Settlement, page 9, question 2, says the same. In No. 63, *Punjab Record*, 1885, it was found after inquiry in Lahore that Sindhu Jats who had emigrated from Kana Kacha in that District to Kot Jograj in the Gurdaspur District were governed by the custom of *Pagwand*.

All this constitutes a strong case in support of the defendants' contention, and the plaintiffs have failed to rebut it. The oral evidence on both sides is of little value and may be left out of account. It may be the case that the *Chundawand* rule prevailed more in the old days, but there can be no doubt that *Pagwand* is now the dominant custom in the parties' tribe and locality. Probably it is gradually superseding the other everywhere.

We uphold the decree of the Divisional Judge and dismiss this appeal with costs.

Appeal dismissed.

No. 75.

*Before Mr. Justice Chatterji and Mr. Justice Robertson.*ARUR SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,*Versus*MUSSAMMAT LACHMI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 825 of 1896.

Custom—Alienation by sonless proprietor—Locus standi of remote collaterals to object to alienation—Dhillon Jats, Lahore District.

The right of male agnates to contest alienations by sonless proprietors is founded on the fundamental principles on which land is held among agricultural tribes in the Punjab, and so far from there being any *a priori* presumption against the *locus standi* of male agnates beyond a certain degree of relationship to object to such alienations, the presumption is exactly the reverse.

Held, therefore, in a case in which the parties were Dhillon Jats of the Lahore District, that plaintiffs who were related to the alienor in the ninth degree were competent to object to the alienation in question.

The mere facts that the property in dispute was situate in a large place (*m. Basin*), which was almost a town, that land was held there by various tribes, and that numerous alienations had taken place therein (but almost all subsequently to 1893) without objection by male agnates, *held* not to be *per se* sufficient to establish the right of a sonless proprietor to alienate without necessity.

Further appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 31st October 1895.

Jaishi Ram, for appellants.

Shib Das, for respondents.

The case was remanded for further inquiry by the following order of the Court, delivered by

CHATTERJI, J.—The facts of this case appear from the judgments of lower Courts. According to the genealogical tree the plaintiffs are related to the alienor in the ninth degree including him as well as the common ancestor Malika in the reckoning. The parties are Dhillon Jats. 15th Jany. 1899.

The first point for decision is whether plaintiffs are competent to object to the alienation by virtue of their relationship to Arjan Singh. The lower Courts have held on the strength of certain rulings of this Court, *viz.*, Nos. 20, *Punjab Record*, 1890, 118, *Punjab Record*, 1891, 9, *Punjab Record*, 1892, 56, *Punjab Record*, 1889, 113, *Punjab Record*, 1883, and 15, *Punjab Record*, 1888, that they are not. We do not think these authorities are

sufficient to justify the decision of the question of plaintiffs' *locus standi* adversely to them on *a priori* grounds. No. 113, *Punjab Record*, 1883, was decided before the burden of proof in regard to alienations of ancestral land by childless proprietors among Punjab agriculturists in the presence of male agnates was definitely laid down by a Full Bench of this Court in No. 107, *Punjab Record*, 1887. In Nos. 56, *Punjab Record*, 1889, and 9, *Punjab Record*, 1892, it was found upon inquiry that by custom remote collaterals were not competent to object though it is noteworthy that the order of remand in the latter case sets out that there was a presumption in favour of the then plaintiffs who were related to the alienor in the eighth degree. In Nos. 118, *Punjab Record*, 1891, and 15, *Punjab Record*, 1888, the finding was in favour of distant collaterals though doubtless the villages in which the disputed lands were situate were held compactly by single tribes. It was also pointed out in the latter judgment that no hard-and-fast rule that relations beyond a certain degree had no *locus standi* could be laid down. No. 20, *Punjab Record*, 1890, was a decision on the facts of that particular case though it followed certain earlier authorities. The tenure of the village is no doubt an important factor in questions of this kind, but it does not by itself enable the Court to decide what degree of relationship entitles a male collateral to object and what disqualifies him from doing so. It has a more immediate bearing on the question whether the childless male proprietor is uncontrolled or not in his power of alienation.

In later decisions of this Court where the matter has been directly considered and decided the rule laid down is that there is no *a priori* presumption against the *locus standi* of male agnates beyond a certain degree of relationship to object to alienations of this description, and that the presumption is exactly the reverse. See Nos. 100 and 101, *Punjab Record*, 1893, where the reported cases on the point were discussed, and it was held that no definite rule could be deduced from them to the effect that relations within a certain degree of propinquity alone could be presumed to be entitled to object to alienations by a sonless proprietor and not those beyond that limit, and that in the case of a plaintiff falling under the latter category the Court would be justified in framing a preliminary issue and calling on him to prove his right to sue by custom. See also No. 14, *Punjab Record*, 1895, to the same effect, and Roe and Rattigan's *Tribal Law in the Punjab*, pages 126, 127.

The right of male agnates to contest such alienations is founded on the fundamental principles on which land is held

among agricultural tribes in the Punjab. As observed by Sir Meredyth Plowden in No. 50, *Punjab Record*, 1893, page 230: "No individual, whether or not he has male issue, is under ordinary circumstances competent by his own act to prevent the devolution of ancestral land in accordance with the rules of inheritance, that is upon his male descendants in the male line, if any, or failing them upon his agnate kinsmen in the order of proximity. The exercise of any power which would affect the operation of these rules to the detriment of the natural successors to ancestral land is liable to be controlled by them whether the act done be a partition or gift or sale or mortgage otherwise than for necessity." This rule has been thoroughly recognized since the passing of the Full Bench decision No. 107, *Punjab Record*, 1887. This being the case all agnates who are heirs by virtue of their relationship have presumably the right of objection to any act which injures their right of succession, and it is difficult to see how an arbitrary line can be drawn in favour of agnates up to a certain degree, and those beyond excluded from the benefit of the presumption. Suppose A has an admitted right to contest an alienation without necessity by B, his collateral fifth in descent from the common ancestor. How can it be assumed that he loses his right, or that it should be presumed not to exist, if B happens to die before him and the alienation is made by B's son.

We find, therefore, on the first issue that plaintiffs have a *locus standi* to sue.

The next issue as to the power of Arjan Singh to alienate without necessity has been found in the affirmative against the plaintiffs' contention. But we are unable to accept this view. The grounds of the lower Courts' decision are that Basin is a large place, almost a town, in which land is held by various tribes, and that numerous alienations have taken place therein without objection by the male agnates. As regards the constitution of the village the information is very meagre. The Patwari says the tenure is *pattidari bhayachara*, and no attempt was made to ascertain its real character. The mere fact that land in the village is held by several tribes is not unfavourable to the plaintiffs if the holdings are compact and ancestral. As regards the alienations more than a hundred are said to have taken place according to the Patwari, but they are almost all subsequent to 1893, and it was therefore impossible to say with any certainty at the time the case was tried that they were not objected to by the collaterals. The facts of these alienations were not inquired into as the lower Courts were apparently under

the impression that a mere multitude of such transfers were sufficient to establish an unrestricted power of alienation. That no suits were filed may have been due to the fact that the reversioners were satisfied that the alienations were proper, or that their consent was obtained, or that they were too poor to litigate, or the amount of land alienated may have been very small. Nothing was done to ascertain if their quiescence was due to any of the above causes. It must also be borne in mind that a reversioner is not bound to sue so that his mere silence generally goes for nothing, while if he sues and obtains a decree the fact goes far to prove the custom. It appears from the Patwari's evidence that there was a suit of this nature in the village before in which decree was passed, *Chetu Singh v. Chanda Singh*, but the record appears not to have been sent for, nor any attention paid to the case. There has never been a judicial decision that the custom of unrestricted alienation prevails among the proprietors of this village generally, or the Dhillon Jat portion of them in particular. The ordinary presumption is the other way, and there are published cases which show that Dhillon Jats follow the usual agricultural custom. We consider the inquiry on this point has been an extremely perfunctory one, and that a fresh investigation is necessary before it can be properly disposed of.

As regards the last point, *viz.*, whether there was legal necessity for the alienation, it would seem that the first two issues having been decided against the plaintiffs, the lower Courts did not consider it of much consequence and give it more than a cursory notice. This remark is especially true of the Divisional Judge's finding. A considerable quantity of evidence has no doubt been produced by the defendants, but it has not been sifted and properly scrutinized. The broad facts bearing on this question are that Arjan Singh was a young man of 22 or 23 years of age, that he had no ancestral debts to discharge and got the estate, which is a fairly considerable one, altogether unencumbered, and that the debt for which the present mortgage was effected was run up within a short time. Some of the creditors whose debts were paid off by the mortgage are connected with each other. Khushala admits owing money to, and having dealings with, Shankar Das who got the bulk of the mortgage-money. The appellants have filed a mortgage-deed for Rs. 4,000, executed by Arjan Singh after the date of the Divisional Judge's decree, *viz.*, on the 14th May 1896, in which Shankar Das is a joint mortgagee with Gopal Singh and Mul Singh, respondents, to the extent of a half share. This would

indicate that Shankar Das and the present mortgagees have dealings in common, and it is suggested that they all laid their plans together to acquire the land of Arjan Singh by lending him money for gratifying his taste for debauchery and extravagance. Shankar Das is said to be a member of a firm of repute, but he did not produce all his books to support his transactions with Arjan Singh. We refrain from discussing in detail the items said to have been advanced to Arjan Singh as we do not wish at this stage to give a definite opinion on the question of necessity, but the fact of Arjan Singh, a young Jat with no knowledge of business, having taken a liquor contract and sustained losses therefrom and his buying a mare, now dead, from one Khushali for Rs. 128, are matters which strike us as rather peculiar, and the advances made to cover these items deserve to be carefully scrutinized. The circumstances are such that the Court would be justified in asking the alienees to show that they dealt in good faith with Arjan Singh. It is urged by the respondents' pleader before us and stated by some of the defendants' witnesses that Arjan Singh was necessitated to borrow money in order to fight the plaintiffs who were his guardians during infancy and who would not allow him to enjoy the income of his property on attaining majority. The guardians appear to have acted honestly so far that they did not run up debts nor encumber the minor's estate, but their subsequent conduct should be inquired into in order to see whether it compelled Arjan Singh to borrow money for necessary expenses.

We remand the case to the Court of first instance for a further inquiry into the issues—

- (1). Whether Arjan Singh had an unrestricted power of alienation by custom.
- (2). Whether the alienation in dispute was made for necessity, and if so, to what extent.

The investigation should be a searching one and will be completed with all reasonable despatch, and the return of the Court will be submitted through the Divisional Judge who will also give his opinion.

Appeal allowed; cause remanded.

No. 76.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

JOWAHIR SINGH,—(DEFENDANT),—APPELLANT,

*Versus*DIAL SINGH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 538 of 1896.

Custom—Alienation—Gift to sister's son followed by possession and mutation of names—"Ancestral property."

In a case in which the property in dispute had been acquired by one K jointly with his brothers, but had never been held by their father, *held*, that the said property was not ancestral property *qua* K's collaterals.

Held, therefore, that a gift of such property, followed by possession and mutation of names, by K in his lifetime to his sister's son was not invalid by custom.

Mutation of names by itself does not in every case constitute a valid transfer, but it is good evidence of such transfer.

Further appeal from the order of A. Kensington, Esquire, Divisional Judge, Amballa Division, dated 27th April 1896.

Browne, for appellant.

Shelverton, for respondents.

The judgment of the Court was delivered by

13th Jany. 1899.

ROBERTSON, J.—In this case the plaintiffs sued one Jowahir Singh for possession of certain lands which had come to Jowahir Singh in virtue of his alleged adoption by one Kahna, whose collaterals plaintiffs have been found to be. A deed of adoption was executed by Kahna in Jowahir Singh's favour in 1876, and on 22nd May 1893 Kahna gifted this land orally to Jowahir Singh, the gift being accompanied by possession and mutation of names in the revenue records. Jowahir Singh was sister's son to Kahna, his adoptive father. The original Court found that "as Kahna adopted the defendant as a son, "and also made a gift of his property in his favour, the plaintiffs have no right to contest it, and they are not entitled to "possession." On appeal to the Divisional Court the learned Judge accepted the appeal, holding that the adoption, even if a fact, is clearly invalid, following *Punjab Record*, No. 19 of 1895, and that the property was ancestral, and it could not be alienated to Jowahir Singh by Kahna.

The decision that the adoption was invalid according to custom, we do not propose to discuss.

It appears, however, to be clearly established that over and above the adoption there was a definite gift of this property made by Kahna to Jowahir Singh during his lifetime, *i.e.*, on 22nd May 1893. Mutation of names by itself would not in every case, of course, constitute a valid transfer, but it is good evidence of it, and in this case the fact of the gift is held by the first Court to be established—the learned Divisional Judge has not traversed this finding, and it is therefore to be taken as a fact that the gift was actually completed, and this clearly appears to be so. This being so the only question left for consideration is whether or not this gift was valid, and this again turns entirely on the question whether the property was “ancestral” or not. The learned Divisional Judge says: “It is immaterial whether the land was acquired by a common ancestor or not. The plaintiffs’ claim as heir is not affected by any finding on this point, the evidence showing at most that the land was jointly acquired by all the sons of Amrik Singh from whom both they and Kahna are descended.” As to the question of heirship this is, of course, correct, but it ignores the fact of this gift. As to the property being ancestral it appears that it was acquired jointly by Kahna and his brothers, but was never held by their father, Amrik Singh, and was held separately by Kahna and the plaintiffs. It was therefore clearly not property held by a common ancestor, which is now the accepted definition of ancestral property *qua* collaterals (see *Punjab Record*, No. 43 of 1893, *inter alia*). The fact that several brothers jointly acquired the property does not in this connection make it ancestral; each share was the self-acquired property of the sharer. Kahna *qua* collateral of his father had the same powers of alienation as his father, and acquired property, moveable or immoveable, is ordinarily alienable according to the will and pleasure of the lawful owner, and, moreover, the same power of alienation ordinarily exists with respect to joint and separate property. It must therefore clearly be held that this property is not “ancestral,” and this being so, and the fact of the gift by Kahna to Jowahir Singh being established, there is nothing to show that this gift was invalid, and it must be maintained. The judgment and order of the lower appellate Court is accordingly set aside, and the claim of the plaintiffs dismissed with costs throughout.

Appeal allowed.

No. 77.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

SARDAR UMRAO SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

APPELLATE SIDE. }

Versus

SARDAR THAKAR SINGH,—(DEFENDANT),—
RESPONDENT.

Case No. 705 of 1896.

Construction of document—Provision in mortgage-deed regarding interest.

In the case of a mortgage-deed in which there is a rate of interest fixed, without any specific condition that its payment shall cease on a certain contingency, and a clause specifying a date of redemption and conditional sale, it is generally to be held on a consideration of all the terms of the deed taken together, in the absence of clear intention to the contrary, that the contract does not contemplate the cessation of interest from the date when the payment of the capital sum becomes due.

When, therefore, a mortgage deed provided that the mortgagor was to remain in possession, paying interest on the mortgage-money at 6 per cent. per annum half-yearly; that on default of payment of interest compound interest was to be charged; that on default of payment of interest for four successive half-years, possession was to be given to the mortgagee and the produce of the land was to be taken in lieu of interest; that the mortgaged property was to be redeemed within six years, and if not then redeemed, the mortgage was to become *ipso facto* a sale; and it appeared that there had been no breach of the condition regarding the failure to pay interest for four successive half-years previous to the end of the six years allowed for redemption, but that subsequently to the expiry of the said period, there had been a failure to pay interest for four successive half-years,

Held, that as there was no condition that interest should cease to run on the terms stated after the expiry of six years, defendant's failure to pay interest for four successive half-years after the expiry of the six years allowed for redemption was a clear breach of the terms of the contract and entitled plaintiff to obtain possession of the land as mortgagee, and that he was not bound to resort to the other relief, which he might have claimed, of foreclosure.

Further appeal from the order of Khan Muhammad Hayat Khan, C. S. I., Additional Divisional Judge, Amritsar Division, dated 18th April 1896.

Lal Chand, for appellants.

Ganpat Rai, for respondent.

The judgment of the Court was delivered by

17th Jany. 1899.

ROBERTSON, J.—In this case the plaintiffs sued under a mortgage-deed for possession as mortgagees of 804 kanals 6 marlas of land which had been mortgaged to them by defendants by

deed dated 13th September 1878. The original Court decreed the claim, but the lower appellate Court dismissed it. The two Courts differently interpreted the rights of the plaintiffs under the deed, the provisions of which required careful consideration. The deed provides that the mortgagor was to remain in possession, and to pay interest on the mortgage-money at 6 per cent. per annum half-yearly, on default of payment of interest compound interest to be charged ; then comes the important clause—

(5) If default is made in the payment of interest for four successive half-years then possession was to be given to the mortgagee, and the produce of the land was to be taken in lieu of interest ; (6) that the mortgaged property was to be redeemed within six years ; (7) that if it were not so redeemed the mortgage should become *ipso facto* a sale.

There certainly did not appear on the pleadings to have been a breach of the conditions regarding interest for four successive years previous to the end of the six years allowed for redemption, and defendant in his second plea urged that there had been no breach, but that the interest due for these six years had been duly paid. In this Court, however, the counsel for the defendant endeavoured as an alternative defence to contend that, as a matter of fact, default of the first four instalments had been made, and consequently the claim was barred by limitation. This he attempts to support by putting in receipts received from the Court of Wards under whose charge the plaintiffs, minors, were. The dates of what he suggests show this. But it is quite clear from these receipts and the pleas of the defendants that they are for money paid on account of the interest instalments of these six years, and as defendants themselves denied that there had been any breach they cannot be allowed to turn round at the last minute and base their case on the exactly opposite assertion, which plaintiffs have had no opportunity of meeting, *i.e.*, that, as a matter of fact, there was a breach—a fact which the evidence before us does not warrant us in considering to be established. Having disposed of that point, we return to the original claim and defence.

It was contended for the defence that the covenant was only to pay interest for six years, that the provisions that default for four successive half-years was to give plaintiffs a right of entry was to extend only to the six years within which redemption was to be allowed, and that at the expiry of the six years interest would cease to run, and the mortgage would become a sale, the plaintiffs' only relief then being by

way of foreclosure, and these were the grounds on which the lower appellate Court dismissed the claim, and on which the respondent now supports the decree: as to the first point we have a clear ruling of their Lordships of the Privy Council in *XX All.*, page 171, and another in *XIX All.*, page 39. Our attention was also called to *XX Mad.*, page 371, *XXV Calc.*, page 246, *Punjab Record*, No. 28 of 1892, and *Funjab Record*, No. 57 of 1888, all of which we have perused and considered. These cases are very analogous to the one before us, and some of them on all-fours with it, and we must clearly follow the rulings laid down. We are unable therefore to agree with the contention that after the expiry of the period of redemption without redemption having taken place, interest ceased to run. In the case decided by their Lordships of the Privy Council, recorded in *XIX All.*, page 39, plaintiff had sued on a mortgage-deed in which the covenants were for payment of the redemption money within a year, and interest thereon at a certain rate. The deed provided that the borrower should not transfer the mortgaged property until payment in full of the amount due for principal and interest had been made, and that any money paid should be first credited to the latter. In a suit brought more than seven years after the date fixed for payment, the Courts, including the High Court of Allahabad, gave effect to the defence that the creditor had no right under the contract to interest at the specified rate for any period after that date. On appeal to the Privy Council, however, it was held that on true principles of construction of the terms of the deed as a whole it must be held that the creditor was entitled to payment of the principal with interest at the rate specified in the deed for the entire period of non-payment. In *XX All.*, page 171, it was similarly held in the case of a deed, the terms of which as regards payment of interest are very similar to the terms of the deed before us, that according to the tenor of that deed, when all its provisions and conditions were considered, it was not the true construction that the capital sum was to cease to bear interest at the contract rate upon the arrival of the time stipulated for payment.

It would appear from these judgments that, unless the contrary appear, when we have a mortgage-deed in which, as is very commonly the case, there is a rate of interest fixed without any specific condition that its payment shall cease on a certain contingency, and a clause specifying a date of redemption and conditional sale, it is generally to be held on a consideration of all the terms of the deed taken together in the absence

of clear intention to the contrary that the contract does not contemplate the cessation of interest from the date when the payment of the capital sum becomes due. Applying these principles followed in other rulings quoted to the case before us, we are constrained to hold that there was no condition that interest should cease to run on the terms stated after the expiry of six years; that there has therefore been a clear breach of those conditions and of the covenant to pay interest in respect of four consecutive half-yearly instalments after the expiry of the first six years, as is indeed admitted; that the plaintiff had a right to obtain possession of the land as mortgagee; and that he was not bound to resort to the other relief which he might have claimed of foreclosure, as we are informed he has now done.

We must notice for a moment the objections raised by the respondent's counsel that this appeal must be dismissed because plaintiff has now had recourse to the relief of foreclosure. We fail to see any force in this contention. The suit for foreclosure does not affect his right to prosecute this appeal, which for reasons given above we accept with costs, and restore the decree of the original Court.

Appeal allowed.

No. 78.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

CHET SINGH AND OTHERS,—(DEFENDANTS),—

APPELLANTS

Verſus

SAMAND SINGH AND OTHERS,—(PLAINTIFFS),—

RESPONDENTS.

} APPELLATE SIDE.

Case No. 1307 of 1895.

Custom—Succession—Suit between co-proprietors of village in which the land was situate and deceased's near agnates residing in another village—Finding in a previous suit that one of the co-proprietors was deceased's collateral, effect of—Res judicata—Dhillon Jats of Naraingarh, Amritsar District.

Plaintiffs, who were residents of Bhutiwala in the Ferozepore District, claimed certain land left in Naraingarh, Amritsar District, by one Mussamat Premi, widow of Attar Singh, a Dhillon Jat, on the ground that they were descendants of Budh Singh, grandfather of Attar Singh, one plaintiff being his son and the others grandsons and great-grandsons. The defendants were Dhillon Jats of Naraingarh, but claimed no relationship with the deceased, and belonged to a different *taraf* to that of Attar Singh. On the death of Mussamat Premi defendants obtained mutation of names in

their favour despite the objections of plaintiffs who, therefore, instituted the present suit. In the first Court defendants pleaded, *inter alia*, that plaintiffs were not the agnates of the deceased's husband, and that being residents of another village and district, and having had no connection with Naraingarh or the family of the deceased, they were excluded by law and custom. The first Court drew issues in accordance with the pleadings, and decided them all in favour of plaintiffs. Defendants appealed to the Chief Court on the same grounds as were urged in the lower Court, and at the hearing it was also contended on their behalf that plaintiffs' claim was barred by a judicial decision of the then Assistant Commissioner of Amritsar, dated 25th August 1871, by which defendants were declared reversioners of the deceased widow, and obtained a decree setting aside, as far as their interests were concerned, a certain mortgage effected by her of part of the land left by her husband. The ground upon which the defendants' contention was based was that in the former suit the widow represented the interests of the reversioners, and that the decision that one of the defendants was her reversioner bound the present plaintiffs if they were the person by agnatic descent entitled to succeed to the estate left by her.

Held, overruling the said contention, that the finding in the former case was merely to the effect that the defendant in question was a collateral of the widow, and as such was competent to contest the widow's mortgage, and that the said finding in no way precluded plaintiff from proving that they were nearer collaterals and had a preferential claim to succeed to the property.

Found, upon the evidence, that plaintiffs were nearer collaterals than the defendants.

Held, therefore, that the plaintiffs' relationships being established, they were the *warisan ek jaddi* of the deceased widow's husband, and their common ancestor had been in possession of the land in suit, and that in such a case there was no authority for holding that the collaterals, because residents in another village, were excluded by the other proprietors in the deceased's village though not related to him.

First appeal from the order of W. A. Harris, Esquire, District Judge, Amritsar, dated 30th October 1895.

Lal Chand, for appellants.

Sham Lal, for respondents.

The judgment of the Court was delivered by

18th Jany. 1899.

CHATTERJI, J.—This is a suit for land left in Naraingarh in the Amritsar District by one Mussammatt Premi, widow of Attar Singh, a Dhillon Jat. The plaintiffs are residents of Bhutiwala in the Mukhtasar *tahsil* of the Ferozepore District, and claim to be the descendants of Budh Singh, the grandfather of Attar Singh, Samand Singh, plaintiff, being his son, and the other plaintiffs his grandsons and great-grandsons. The defendants are Dhillon Jats of Naraingarh, but claim no relationship with the deceased, and belong to a different *taraf* to

that of Attar Singh. On the death of Mussammat Premi the defendants got mutation of names in their favour in spite of the plaintiffs' objection. Hence the claim.

The suit was brought originally for a declaratory decree to which the defendants objected that the plaintiffs were not entitled to get such a decree as they were out of possession. The first Court overruled the objection, holding that plaintiffs' possession was proved. The contention was again raised in this appeal, and at the last hearing on 7th July 1898 we held, after going through the evidence, that it was well founded, but allowed the plaintiffs to amend their plaint and to add a prayer for possession after making up the necessary stamps. This has been done, and the objection has thus been disposed of.

The defendants' pleas on the merits are set out in the second, third and fourth paragraphs of their *jawab-dawa*, pages 2 and 3 of the printed record ; they did not, as already stated, claim to be agnates of Mussammat Premi's husband, but denied that plaintiffs were such, and urged that being residents of another village and district, and having had no connection with Naraingarh or the family of the deceased, they were excluded by law and custom, and that defendants being co-proprietors in the village and being of the same *gôt* had a superior title.

The Court below drew issues in accordance with the pleadings, and found them in plaintiffs' favour, and gave them a decree from which the defendants appeal on the same grounds as were urged before the District Judge. At the hearing their counsel raised a new point on which he laid great stress, *viz.*, that the plaintiffs' claim is barred by a judicial decision of Captain Marshall, Assistant Commissioner, Amritsar, dated 25th August 1871, by which defendants were declared reversioners of the deceased widow, and got a decree setting aside a mortgage for Rs. 500 effected by her of part of the land left by her husband so far as their interests were concerned, except to the extent of Rs. 200.

The record of that case has not been produced, nor any English judgment of the Assistant Commissioner, but from a vernacular translation of that judgment it appears that the suit was brought by Chet Singh, one of the defendants, that the widow denied his relationship and set up her unrestricted power of alienation, but that she subsequently filed a genealogical tree which the plaintiff accepted, and from which it appeared that he was a distant collateral. The Court also found that Mussammat Premi could only alienate for necessity,

and that necessity was proved to the extent of Rs. 200. The Court held the plaintiff to be entitled to a declaratory decree, that on the widow's death he could get the land on payment of Rs. 200 only as mortgage-money and passed a decree to that effect.

Although the point of *res judicata* was not raised in the lower Court, nor in the written grounds of appeal, yet as it can be raised at any stage, provided it can be supported on the existing record, we made no objection to the contention being put forward at the hearing. This question being preliminary to the merits of the case must first be noticed and decided.

Counsel quoted two judgments of their Lordships of the Privy Council, *viz.*, *Hari Nath Chatterjee v. Mothurmohum Goswami*, I. L. R., XXI Calc., 9, and *Sri Raji Ran Lakshmi Kantaiyamm v. Sri Raja Inuganti Rajagopal Ram*, I. L. R., XXI Mad., 344, and a decision of this Court No. 29, *Punjab Record*, 1895, in support of his argument. He also referred to Nos. 139, *Punjab Record*, 1888, and 74, *Punjab Record*, 1895. Briefly his contention was that the widow represented the interests of the reversioners, and that the decision that Chet Singh, the plaintiff, in the former case was her reversioner binds the plaintiffs if they are indeed by agnatic descent the persons entitled to succeed to the estate left by her.

We cannot accede to this contention. Indeed, looking to the circumstances of this case it appears to us so untenable that we should not have bestowed on it any but a passing notice had it not been urged with great pertinacity by a counsel of Mr. Lal Chand's experience and standing. None of the cases quoted appear to us to be in point. In the Calcutta case the point ruled was that reversioners are bound by the results of a litigation fought out in good faith by the female holder for life. The plaintiffs' mother had in her lifetime sued the defendants for possession of certain property, and it had been decided that her claim was barred by time. Plaintiffs brought a second suit for the same property after her death, and it was held that it was barred by the decree in the previous suit. The plaintiffs had acquired by gift a share of the property from their mother's sister's son, who was also a reversioner in plaintiffs' mother's lifetime, and was equally bound by the decree, and it was decided that the bar applied to this share as well. In the Madras case it appears that a Hindu widow who had succeeded to her son's property was sued by the plaintiff's adoptive father, on whose

death plaintiff was substituted on the record, for a declaration that he was entitled to the reversion of the estate held by her, and that certain alienations made by her were not binding on him. She denied the claimant's title, and asserted that the property in her possession except a trifle was her *stridhan*, and that her daughter and daughter's son were her next heirs. These were put on the record, and finally a decree was passed in favour of the plaintiff declaring his right of reversion. The plaintiff's adoptive father was the brother's son of the widow's husband, and it is clear the finding that plaintiff's adoption, the validity of which was denied, was good, and that the property was not the widow's *stridhan*, concluded all questions in controversy between the daughter and the plaintiff. The former took possession of the property on her mother's death, and on plaintiff's claiming possession it was held that she was precluded by the findings in the former suit from raising those questions again. This case is not at all analogous to the present one. In No. 29, *Punjab Record*, 1895, a daughter was held to be bound by the finding in a previous suit between her mother and the plaintiff, that the latter was the duly adopted son of her father's younger brother, though the subsequent suit related to different property. There is nothing in this judgment to support the appellants' contention. The last principle is a well settled doctrine of the law of *res judicata*. The proposition that the reversioners are bound by the results of a *bonâ fide* litigation conducted by the widow in possession of property which would ultimately devolve on them is too well established to be doubted. No detailed notice need therefore be taken of the two other cases quoted by the appellant which are mainly intended to support it.

In the suit of 1871 assuming, as is probably the case, though the appellant did not adduce any proof of it, that the Assistant Commissioner would have been competent to try the present suit, all that was decided was that the then plaintiff was a distant collateral, and had therefore a right to contest Mussammatt Premi's mortgage, and that the mortgage was good to the extent of Rs. 200 only. The real character of the decree has already been noticed. It was not a decree for redemption in favour of the plaintiff to take effect on Mussammatt Premi's death. Now the findings that Chet Singh, now one of the defendants, was a distant collateral of Attar Singh, and therefore competent to contest the widow's mortgage, cannot prevent the present plaintiffs from showing that they are nearer collaterals, and have a preferential claim to succeed to the

property. It was not found as in the Madras case that Chet Singh was the nearest reversioner, plaintiffs were no parties to the suit, and the question of their right was never mooted, much less decided, directly or in effect. Their Lordships of the Privy Council take special care to point out in the Madras case that the question of the plaintiff's being the nearest reversioner was clearly raised in the pleadings, and that the daughter on being made a party in the preceding suit distinctly set up her own rights in opposition to those of the plaintiff. In No. 29, *Punjab Record*, 1895, the finding that the plaintiff was the adopted son of the widow's husband's brother necessarily decided the question of his title to the joint property belonging to the brother, and this was binding on her daughter who claimed to be her reversioner.

The law of *res judicata* requires that the matter pleaded in bar should have been previously determined either expressly or by necessary implication. This, of course, presupposes that there was a substantial contest on the point between the parties or their predecessors or privies in title. This happened in all the three cases quoted by counsel. In the present case there is nothing in the finding of the Assistant Commissioner in the suit of 1871 which militates against the plaintiffs' claim. That Chet Singh was held to be a distant collateral does not, as already stated, prevent plaintiffs from showing that they are more nearly related to Attar Singh, while the fact that he got a declaratory decree against the widow's alienation is not even *prima facie* proof that he was held to be the nearest reversioner. In Indian practice it is an every-day experience that such decrees are granted in favour of remote reversioners where the near ones do not object to the widow's alienation, or have precluded themselves by their own acts from contesting it, or are females with limited rights. In such cases the nearer reversioners do not lose their right of succession on the widow's death by reason of the decrees. It is easily conceivable that a near reversioner might be absent when the alienation takes place, or his existence might be unknown. Would the fact of a more distant reversioner getting a decree without any mention being made of him preclude him asserting his rights when the succession opened out? We do not think any of the authorities cited by appellants' counsel establishes any such proposition.

Further, if this argument had any force it would have been necessary to see whether the widow litigated in good faith in that case so as to bind the reversioners' interest. Good faith

presupposes at least ordinary care. But it appears that the widow in 1871 though she denied Chet Singh's relationship at first herself propounded a genealogical tree which was accepted by the plaintiff, and which showed him to be a remote agnate. Yet in the present case Chet Singh has not been able to produce any such tree, nor to prove his relationship. The plaintiffs cannot be held bound by the results of a litigation so negligently and carelessly conducted. See No. 29, *Punjab Record*, 1898.

We accordingly overrule the contention that the plaintiffs are barred from making their claim by the rule of *res judicata*.

As regards the question of plaintiffs' relationship to Attar Singh we see no reason to differ from the finding of the District Judge. The pedigree-table of Mauza Bhutiwala of the Settlement of 1873, pages 15 and 16 of the printed record, shows Attar Singh to be the grandson of Budh Singh, and it is stated that Budh Singh has land at Naraingarh which is in possession of Dewa Singh, Attar Singh's father and son of Budh Singh. The genealogical tree of Naraingarh prepared in the Settlement of 1894-95 makes no mention of the plaintiffs' branch, but the remarks under it, para. I, show that Budh Singh founded the village 72 years before, and on becoming poor went away to Malwa, whence he was brought back by Dharam Singh, the defendants' ancestor. This to some extent corroborates the entries in the pedigree-table of Bhutiwala. The pedigree-table of the previous settlement contains a statement to the same effect. In addition to this there are three witnesses called by the plaintiffs who support their allegation as to relationship, and one of whom, Kharak Singh, is aged 70 years, and is resident of defendants' village. This oral evidence by itself is possibly not very strong, but taken in connection with the pedigree-table of Bhutiwala, which is to be presumed correct, it is sufficiently reliable. Besides, Samand Singh, one of the plaintiffs, is actually a son of Budh Singh, so that the fact of Budh Singh's existence has probably not passed beyond the memory of man. From the *shajra-nasabs* of Naraingarh he appears to have been a man of some mark as he held the village in *jagir* in Sikh times, and therefore likely to be known to and remembered by the witnesses. The date of foundation of the village given in the two settlement records makes it probable that he was actually seen by some of the witnesses, for he was then in all likelihood in his prime, and he is said to have been brought back to the village a second time during the reign of Maharaja Sher Singh. He must therefore have been alive as late as 1841-43. On the

whole, we think the relationship of the plaintiffs to Attar Singh is well proved by the evidence. The defendants have produced nothing to rebut it.

The next point argued by counsel is that according to the genealogical trees of both settlements when Budh Singh was brought back to the village by Dharam Singh he really gifted half of it to Budh Singh, as he had taken possession of the whole after the latter's abandonment, and that on failure of the issue of Attar Singh the land ought to revert to the donor's family. We do not think the settlement records establish a gift to Budh Singh by Dharam Singh, and even if this were the case the plaintiffs being the lineal descendants of Budh Singh would, we apprehend, have a superior claim to succeed by custom. No. 12, *Punjab Record*, 1892, appears not to have any bearing on the case.

Lastly, it is contended that plaintiffs being residents and proprietors in another village and district are excluded by the defendants who are co-proprietors in the village where the land is situate. Nos. 143, *Punjab Record*, 1888, 64 and 141 of 1893, are quoted in support of this contention. In the first case the contest was between agnates equally related, and it was held that having regard to the partition made by the common ancestor by making two groups of his descendants and giving them land in two different villages, and bar equities of the case, the relations resident in the same village as the deceased presumably had a prior claim by custom to his share. No. 64, *Punjab Record*, 1893, related to land acquired left a person in a village different to his village of origin, and it was held that his male collaterals from the latter place had no right to succeed to such property in preference to his daughter's son, and an opinion was expressed that in such case the co-proprietors of the village in which the land was situate had probably a superior right of succession to the claimants. This, however, was not decided expressly or by implication. In No. 141 of 1893 the plaintiff was the son of a female cousin of the last male owner, a Jat, whose ancestor had got it by gift from one of the village proprietors. The defendants were the village proprietors who were of the same caste as the deceased, but belonged to a different *gôt*. It was held that plaintiff was not in the line of heirs of the deceased not being one of his *warisan ekjaddi*, and that the burden of proving a superior right to that of the defendants who were in possession lay on him which he had not discharged.

None of these cases furnish a guiding principle for the decision of the point raised by appellants. The plaintiffs are,

their relationship being established, the *warisan ekjaddi* of the deceased widow's husband, and their common ancestor, Budh Singh, was in possession of the land in dispute. There is no authority for saying that in such a case the collaterals, because resident in another village, are excluded by the other proprietors in the deceased's village though not related to him. To say so would be to practically lay down the broad proposition that collateral succession to ancestral land in another village, where the claimants own no land, is disallowed by custom. In other words a man's own brother may thus be postponed to utter outsiders. We do not think there is any such rule of customary law in force, and no evidence has been produced by the plaintiffs in this case to establish it.

The appeal is dismissed with costs.

Appeal dismissed.

No. 79.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Reid.

CHIRAGHA AND OTHERS,—(PLAINTIFFS),—
APPELLANTS.

Versus

MAHTABA AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 724 of 1896.

Limitation Act, 1877, Articles 141, 142—Adverse possession—Suit by reversioners on death of widow.

In a case in which it was proved that adverse possession had begun against a certain widow in 1882, that the said widow died in 1883, and that her reversioners sued in 1895 for possession,

Held, that the reversioners' cause of action accrued on the death of the said widow, and that their suit, instituted within twelve years of that event, was within time.

Fundravandas v. Cursondas, I. L. R., XXI Bom., 646, approved.

Further appeal from the order of C. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 12th May 1896.

Lal Chand, for appellants.

Ishwar Das, for respondents.

The facts of the case sufficiently appear from the judgment of the Court delivered by

REID, J.—This is a suit by the collaterals of Sahib Singh 23rd Jany. 1899. for property in the possession of the respondents, which the plaintiffs-appellants allege to have been left by Sahib Singh.

The suit was decreed in part by the Court of first instance, and was dismissed by the lower appellate Court solely on the ground that it was barred by limitation under Article 142, Schedule II, of the Limitation Act. We are satisfied, and indeed it is practically admitted, that Sahib Singh was recorded as owner of the land in suit at the Settlement of 1852, that he continued to be so recorded until his death in 1867, and that from 1867 until the Settlement of 1882 his widow, Mussammat Sundran, was so recorded as his successor. With the exception of a small area recorded as cultivated by Sahib Singh, his land was recorded as being in possession of various tenants and co-sharers, including some of the defendants, as cultivators.

The only indication pointed out to us that this state of affairs did not continue until 1882 is an allusion to the partition of the *shamilat* in proportion to the cultivating holding recorded, in proceedings commenced just before the death of Sahib Singh, and we see no reason to hold that any adverse title, such as would terminate the relation of landlord and tenant or licensor and licensee, was set up until 1882.

[On becoming aware that the land in suit had been recorded in the names of others by the Settlement authorities Mussammat Sundran objected, was referred to the Civil Courts, and died in May 1883. The present suit was instituted in April 1895, within twelve years of the death of Mussammat Sundran.

In this view of the facts it is not contended that the suit is not governed by Article 141, Schedule II, of the Limitation Act, but the pleader for the respondents relies on No. 74, *Punjab Record*, 1895, as authority for the proposition that the suit is barred by limitation, even under that article.

On the facts, as already stated, we hold that adverse possession did not begin to run against Mussammat Sundran until July 1882, and her cause of action accrued then. In No. 74, *Punjab Record*, 1895, the then Senior Judge said, in referring the appeal to a Bench, "If the gift by A. K. to S. K. was invalid, the widow "would have had a right to sue for possession in 1882, which "right to sue would devolve on the kinsmen at her death, and "would be barred in twelve years from that date. I understand that this point is not decided, but there seems to be a "leaning to the view that her non-claim might be disregarded "by the heirs, which seems to me a questionable view."

It is contended that this amounts to a ruling that where time has begun to run against the widow it continues on her death against the reversioners, against whom possession would

become adverse twelve years after it commenced against the widow.

We cannot allow this contention. Suggestions thrown out in an order of reference are not rulings, and no decision was arrived at in the order, while "that date" may refer either to "1882" or to "her death." The judgment on the reference does not help the respondent, nor do the authorities quoted therein, some of which go further than it is necessary to go for the purposes of this appeal.

The case law on the subject is summed up by the late Chief Justice of the Bombay Court in *Vundravandas v. Curson-das*, I. L. R., XXI Bom., 646, at page 670, thus: "It is clear that "adverse possession against a Hindu widow for any period less "than the full statutory period of twelve years is now valueless "as against the person entitled to succeed on her death. He has "still the full statutory period of twelve years to sue after her "death. No time has in that case run in favour of the "adverse possession against the Hindu male heir. This was "not so under the old law. Under it time was running in his "favour during the widow's lifetime. Now it begins to run "in his favour only on her death. A Hindu entitled to the "possession of immoveable property on the death of a Hindu "female appears to us to mean a Hindu whose title to the "possession of immoveable property accrues upon the death of "a Hindu female, and does not except the case where, "during the lifetime of the widow, the adverse possessor has "been in possession for twelve years. This view of the law "has been accepted by all the Indian High Courts with the "exception perhaps of Madras, but there the question was not "discussed."

As already remarked, this goes further than is necessary for the purpose of this appeal, but we have no hesitation in concurring in the rule laid down, and we hold that the appellants' cause of action accrued on the death of Mussammat Sundran, and that their suit instituted within twelve years of that event was within time. We set aside the decree of the lower appellate Court and remand the appeal under Section 562 of the Code of Civil Procedure for decision of the undecided issues. The court-fee on the memorandum of appeal in this Court will be refunded, and costs will be costs in the cause.

Appeal allowed: cause remanded.

No. 80.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Anderson.

DESA SINGH,—(PLAINTIFF),—PETITIONER,

Versus

NARAIN DAS AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

Case No. 1369 of 1897.

Jurisdiction of Small Cause Court—Suit by lessee of Government ferry for recovery of tolls—Small Cause Court Act, 1887, 2nd Schedule, Article 13.

Held, that a ferry, such as that at Khusalgarh, must be regarded as immovable property vested in the Local Government, and that a plaintiff, when claiming as lessee of the ferry to recover tolls or dues, claims to recover by reason of an interest in immovable property transferred to him by Government.

Held, therefore, that such a suit is excluded from the cognizance of a Small Cause Court by Article 13 of the 2nd Schedule to the Small Cause Court Act, 1887.

Petition for revision of the order of L. White King, Esquire, District Judge, Kohat, dated 27th April 1897.

Ishwar Das, for petitioner.

Shelverton, for respondents.

The judgment of the Court was delivered by

4th Jany. 1899.

ANDERSON, J.—This case with several others based on the same grounds has been sent before a Bench for decision by an order of a Judge in Chambers who had some doubts as to the correctness of the decision of a single Judge of this Court as reported in *Punjab Record*, No. 48 of 1897, in which it was held that a suit by the lessee of a Government ferry for recovery of tolls falls under Article 13 of the 2nd Schedule of the Small Cause Court Act of 1887, and is, therefore, excluded from the cognizance of a Small Cause Court, and that the decree then passed by a Mansiff was not appealable to the Court of the District Judge.

We have heard arguments and have referred to the law bearing on the question at issue as laid down in the General Clauses Act, X of 1897, and the Northern India Ferries Act, XVII of 1878. The conclusion we reach is that a ferry such as that at Khusalgarh must be regarded as immovable property vested in the Local Government and that the plaintiff, when claiming as the lessee of the ferry to recover tolls or dues, claims to recover by reason of an interest in immovable property transferred to him by Government, and this suit must be held to fall under Article 13 of the 2nd Schedule of Act IX of 1887.

We are, therefore, of opinion that the suit was not cognizable by a Small Cause Court, and, consequently, the appeal from the order of the Munsiff lay, not to the Court of the District Judge, but to that of the Divisional Judge.

Accepting the appeal on the first ground, without, in any way, going into the merits of the case, we set aside the District Judge's order and direct that the appeal to his Court be returned to the plaintiff for presentation in the Court of the Divisional Judge. The Court-fee will be refunded on application. Costs of this Court to be costs in the cause. Pleader's fee Rs. 10.

Application allowed.

No. 81.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

NIHALA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

BIKHAM RAM,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Case No. 378 of 1896.

Suit for possession on ground that a certain sale was invalid as against plaintiff—Plea by defendant that plaintiffs acquiesced in sale—"Acquiescence"—Estoppel.

Plaintiff sued for possession of certain land and houses which had been sold in 1876 by their near collateral, one K., a childless proprietor, in favour of defendant. The defendant pleaded, and the lower Court found, acquiescence in the sale on the part of plaintiffs disentitling them to set aside the alienation, and dismissed the suit. It was proved that plaintiffs, whether or not they knew of the alienation at the time it was effected, had knowledge of it in 1878, when they gave evidence on behalf of defendant in a case in which he sued a certain tenant of his for damages for cutting a tree; that they made no mention of their rights, though present on each occasion, when the defendant twice applied, in 1880 and 1886, for partition on the strength of his deed of purchase; that they also raised no objection to his acquiring the rights of certain hereditary tenants, and that, finally, many years after the sale they took up some land from the defendant for the purpose of cultivation and tilled it almost up to the date of suit. In the last case it appeared that plaintiff, subsequently to partition proceedings, exchanged certain lands allotted to them for others which had fallen to the share of defendant, and executed certain documents, in one of which they expressly stated that they accepted the purchase by defendant in 1876 and waived all rights to object thereto. On behalf of plaintiff it was contended that inasmuch as all the above-specified acts took place *after* the sale, plaintiffs were not thereby estopped from attacking the said transfer as they had not by any such act misled the defendant or induced him to enter into the sale transaction.

Held, that plaintiffs were precluded by their acquiescence and express words from making the present claim, and that their suit had been rightly dismissed.

First appeal from the order of Lala Aya Ram, District Judge, Hoshiarpur, dated 10th January 1896.

Ishwar Das, for appellants.

Lal Chand, for respondent.

The judgment of the Court was delivered by

23rd Jany. 1899.

CHATTERJI, J.—This is a suit by certain Rajputs of Badoli in the District of Hoshiarpur for possession of land and houses which belonged to one Kharku, a collateral of the plaintiffs in the fourth degree, and which were sold by him to the defendant-respondent Bikham Ram, on 5th April 1876. The plaintiffs allege that the sale was without any legal necessity and that Kharku, a childless male proprietor, was incompetent to effect it by custom.

The pleas were that the plaintiffs had full knowledge of the sale all along and never objected to it, that their silence and conduct amounts to acquiescence, which disentitles them to object, that defendant had purchased other rights connected with part of the property sold, and had otherwise made improvements of a very large value, that the transfer was valid and for good consideration, and that even if the plaintiffs were found entitled to a decree they could not under any circumstances get possession of the new acquisitions made by the defendant nor eject him from the rest of the land without payment of compensation.

On the pleadings the Court below, the District Judge of Hoshiarpur, drew six issues which substantially cover all the points in dispute. He after recording all the evidence of the parties, found the first issue, which was—"Did the plaintiffs know of the transfer of the property in dispute from the day of transfer, and have their acts been such as to estop them from bringing this suit," in defendant's favour and dismissed the suit. This is the first point for consideration in this appeal.

The plaint was filed on 25th May 1891, and in it the plaintiffs stated that Kharku had died one-and-a-half year before.

The lower Court has found acquiescence on the part of the plaintiffs, disentitling them now to set aside the alienation on the following acts and conduct of the plaintiffs :—

- (1) In November 1878, in a suit brought by defendant against an occupancy tenant for the value of a tree cut by him, Bhupa and Jai Chand, plaintiffs, deposed in favour of the former and made no mention of their rights. Jangi, father of plaintiffs 4 to 7, did the same, though he gave evidence for the tenant.

- (2) In December 1880 defendant applied for partition of *shamilat* holdings and the matter remained pending for nearly five years, but plaintiffs, though present and taking part in the proceedings, never denied defendant's title on the sale by Kharku.
- (3) It is clear from the patwari's statement and other evidence that plaintiffs cultivated part of the land in dispute as defendant's tenants, from 1884 up to time of suit.
- (4) In 1885 and 1886 the defendant acquired the rights of certain occupancy tenants by purchase and applied for mutation of names. Bhupa was called and stated that he had no objection.
- (5) In December 1886 Bikham Ram, defendant, again applied for partition of *shamilat khatas*, some having been left joint at the former partition. This was sanctioned on 27th January 1888. Plaintiffs throughout the proceedings were consenting parties.
- (6) Subsequent to the partition, the plaintiffs made certain exchanges of lands allotted to them for others which had fallen to defendant's share and wrote deeds, Exhibits 9 and 11, in defendant's favour. In these they not only did not set up their rights in the land in dispute but recognized defendant's ownership as purchaser from Kharku. In the last-mentioned document they expressly stated that they accepted the purchase and waived all right to object to it. These deeds were executed in June 1888, and are well proved by evidence. About the same time, Jangi and Blupa wrote another deed agreeing to defendant's acquiring certain occupancy rights, Exhibit 10.

Counsel for appellants has addressed us at great length, pointing out that all these acts were done *after* the sale by Kharku, that some of them, *e. g.*, giving evidence for defendant in the case of 1878, are altogether inconclusive, that any renunciation of right subsequent to the sale is only binding on plaintiffs if made with a full knowledge of all material facts and for adequate consideration, that no legal estoppel nor valid agreement to give up their claim has been established against the plaintiffs. Great stress is laid on the first part of the argument, *viz.*, that acts indicating consent to the sale *after* it had taken place do not estop the plaintiffs, as they did not mislead the defendant or induce him to enter into the sale transaction.

The term, acquiescence, has divergent significations and the authorities are numerous as to the circumstances under which it amounts to an estoppel or bars claims to set aside the act acquiesced in. The English rule is thus stated in *Duke of Leeds v. Amherst* (II Ph., 117): "If a person having a right and seeing another person about to commit, or in the act of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed, he cannot afterwards be heard to complain of the act." This Lord Cottenham said was the proper sense of the term acquiescence. In *De Bussche v. Alt* (VIII Chan. D., 286), however, the Court of Appeal laid down that when the act complained of was once completed without the knowledge or assent of the party whose right was infringed, the matter must be determined by very different legal considerations. A right of action was vested in him which at all events, as a general rule, could not be diverted without accord or satisfaction or release under seal, and mere submission to the injury short of the period limited by the Statute could not take away such right, and even an express promise by a person injured that he would not take legal proceedings could not by itself constitute a bar, for the promise would be without consideration and not be binding.

This is the principle contended for by appellants before us, as it is strenuously urged that no acts of the plaintiffs prior to, or contemporaneous with, the sale by Kharku are relied upon by the defendant as showing that they had no objection to it, and that acts subsequent to the sale cannot operate to deprive the plaintiffs of their right.

There are, however, numerous Indian authorities which hold that conduct analogous to that of the plaintiffs precludes them from suing to set aside an alienation of immovable property. *Nilatatchi v. Venkatachala Mudali* (I Mad. H. O. Reports, 131), in which a silence of nine years was held to bind plaintiff to a deed of sale to which he was no party, but which conveyed along with others his share in certain land; *Mussummat Jan Koonwar v. Ram Ruttun Neogi, &c.* (XVIII W. R., 500), where long silence irrespective of limitation was held to bind the plaintiff to the terms of a *mokarrari* lease. See to the same effect, *Jeebun Mundul, &c., v. Nadyar Chand Roy* (XXV W. R., 461). In No. 82, *Punjab Record*, 1881, an owner of land who made no objections to an invalid alienation by an occupancy tenant for over five years was held to have acquiesced in it and

thereby to have precluded himself from suing to annul it, his silence being treated under the circumstances as equivalent to consent. Instances of this kind can easily be multiplied.

In No. 138, *Punjab Record*, 1888, a plaintiff who was the mortgagee of property of which he claimed the right of pre-emption and had given notice to the vendee and recovered the mortgage-money was held to have acquiesced in the sale and waived his right, the Court being of opinion that "it would be against good conscience that a mortgagee who is also pre-emptor should be allowed to deal with a purchase of property one day on the footing that the sale is valid as between them and when he has thus procured the payment of his mortgage, to treat the purchase the next day on the footing that the sale is invalid as between them."

We have quoted the above cases regarding transfer of property and omitted all reference to those relating to obstruction of way, light and air and removal of buildings and plantations and suits of the like character where mandatory injunctions are sought and where such injunctions have been refused on the ground of plaintiff's laches, or acquiescences, the former class being most analogous to the case before us.

The plaintiffs' position during Kharku's lifetime was this. Kharku, a childless male proprietor, had not by custom an unrestricted right of transfer. He could only alienate for legal necessity. If he sold without such necessity his act was not a nullity, but conferred a complete title on the purchaser subject to its being avoided at the instance of the plaintiffs. The right of avoidance only arose on Kharku's death. During his lifetime plaintiffs could only sue for a declaration that the sale was not binding against them. What they did was not only to refrain from bringing such a suit but to let the defendant vendee understand by their acts, conduct and language that they had no objection to the sale and recognized its validity. It is not asserted that the sale was unknown to them at the time and it would be absurd for them to say so considering that they were residents in the village. At all events in 1878, when defendant sued the tenant and they were called as witnesses, they must have known of the fact. At that time they never so much as mentioned their rights nor when the vendee applied for partition twice on the strength of his deed of purchase. Then they, many years after the sale, took up some land from the vendee for the purpose of cultivation and tilled it up to almost the time of suit. They also agreed to his acquiring the rights of certain hereditary tenants. From all these acts and from the general

tenor of their conduct the defendant could not but have understood that they were quite agreeable to the sale and waived their right of avoidance. Mere silence or delay may not justify any such conclusion, but a series of acts and a course of conduct of this character would very naturally, if not necessarily, give rise to such an inference. There is no question that defendant has done many things on this understanding which he would not have done otherwise, and which would otherwise be detrimental to him. The plaintiffs also have fully enjoyed the benefits of such an impression on the defendant's mind. They have got his land for cultivation and effected exchanges of land with him which had they disputed his title he might have refused to allow. Lastly they have in Exhibit 11 expressly accepted the sale, and on that footing got exchanges of land effected.

In our opinion it would be contrary to good conscience if they are now allowed to turn round and to attack the sale and to deprive the purchaser of the benefit of his purchase. It is all very well for them to say that defendant can be restored to his position after the sale took place by being allowed to retain his purchases of occupancy rights and compensated for other improvements, if any, but this is not the real question. At the time the plaintiffs' acts were done and the exchanges effected, plaintiffs' position was not free from difficulty and doubt, even if we assume they had any intention of contesting the sale. They made the best use of their position by getting certain advantages for themselves, though these might not have been at the time altogether commensurate with the value of the land, and they cannot now avoid their acts because they find with reference to recent rulings of this Court that the bargain was not a good one. There was, we think, good consideration in the exchanges allowed by defendant when the consent to Kharku's sale, recited in Exhibit 11, was given. They cannot repudiate that consent after this lapse of time. They have retained the benefits of that transaction and have not even offered to restore them.

We see no reason to think that plaintiffs did not know their rights when they expressed their acceptance of Kharku's transfer. The very act itself negatives any such contention. It is possible that they did not think their rights were so strong as the recent judgments of this Court appear to show, but this is not material, and moreover it is probable that they were satisfied of the necessity of the sale, as Bhupa admits that the land was previously under mortgage. But it is not necessary to go into this question.

We think the plaintiffs are precluded by their acquiescence and express words from making the present claim, and that their suit was rightly dismissed in the Court below.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Full Bench.

No. 82.

Before Mr. Justice Clark, Chief Judge, Mr. Justice Chatterji and Mr. Justice Anderson.

BUTA,—(PLAINTIFF),—APPELLANT,

Versus

MUSSAMMAT JIWANI,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Case No. 168 of 1898.

Partition—Right of widow who has succeeded to her husband's interests in joint holding to claim partition—Grant of such prayer by Revenue Officer—Jurisdiction of Civil Court to entertain subsequent suit by co-sharers objecting that widow is by custom not entitled to claim partition—"Question as to title"—"Owner" and "Lindowner"—Punjab Land Revenue Act, 1887, Sections 111, 115, 116, 158.

Held, by the Full Bench, that though a widow who succeeds to her husband's interests in a joint holding on a life tenure and is recorded as a joint owner in the Revenue papers, is entitled, as being "an owner" within the meaning of Section 111 of the Punjab Land Revenue Act, 1887, to apply for partition before a Revenue Officer, who has a discretion to either grant or refuse her prayer, it is open to the co-sharers, in the event of her prayer being so granted, to seek relief in the Civil Court on the ground that the widow was by custom not entitled to claim partition, such objection on their part raising a question of title in the land sought to be partitioned and therefore giving the Civil Court jurisdiction to entertain the suit.

Further appeal from the order of G. L. Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 27th January 1898.

Ishwar Das, for appellant.

Jaishi Ram, for respondent.

The questions involved were referred to a Full Bench by the following order of the Division Bench (*Chatterji and Anderson, JJ.*):—

CHATTERJI, J.—The material facts are briefly these. Mus-sammat Jiواني, defendant-respondent, is the widow of plaintiff's uncle, Karan, deceased, and is recorded half sharer with plaintiff in a joint *khata* No. 164, containing $119\frac{1}{2}$ *kanals* of land in Hafal. On 19th January 1897 plaintiff brought a suit against the defendant for a declaration that he was the sole proprietor

4th Aug. 1898.

of the holding on the ground that defendant had been divorced by her husband. His allegation was denied, but before issues were framed he on 8th February 1897 withdrew his claim, whereupon it was dismissed. Defendant then applied to the Revenue authorities for partition of the *khata* and plaintiff, on objecting, was referred to the Civil Court to establish his right. He has accordingly brought this declaratory suit alleging that defendant is not entitled to partition (1) by law and custom, and (2) by reason of an arrangement through a *jirga* by which she was assigned 2 *ghumaos* of land for her maintenance.

The first Court held that defendant had no right to claim partition and granted plaintiff the decree he sought. On appeal the Divisional Judge held that plaintiff had not proved that he was entitled to prevent defendant from getting partition and dismissed the suit. The plaintiff appeals and two points are raised on his behalf, (1) that the arrangement through *jirga* set forth in the plaint bars her claim to partition and should have been enquired into, (2) that she has no right by law or custom to demand partition. Several rulings of this Court are quoted in support of the latter contention.

As regards the first point, it is feebly put forward in the plaint, and the 4th ground of appeal which is supposed to cover it is feebler still. It does not appear to have been raised in the Lower Appellate Court. The appellant was no doubt respondent in that Court, but the Judge has fully noticed all the points raised on his behalf, and it is incredible that he should omit to refer to such a point if it was at all pressed before him. Appellant has thus no right to claim an inquiry into it, and, having regard to the form in which it is raised in this Court and the probabilities, particularly the allegations made in the former suit, we do not think it is necessary in the interests of justice to direct an inquiry into the question at this stage.

With reference to the second point there are numerous rulings of this Court from 1868 to 1881 which lay down that a Hindu or Muhammadan widow in the Punjab governed by customary law succeeding to her husband's share in joint property in land is not entitled to demand partition before the Revenue authorities but only to separate possession where it is indispensable to secure her the proper enjoyment of such share. But since those decisions were passed a new Revenue Act has been enacted. In No. 11, *Punjab Record*, 1895, Revenue, the Financial Commissioner of the Punjab held that the widow recorded as a sharer in a joint holding is a "landowner" under that Act and as such is entitled to claim partition, and that her

right to obtain it is only controlled by the discretion of the Revenue Officer under Section 115 to grant it or not. If this view is correct it would seem that the Civil Court cannot give a declaration that she is not entitled to obtain partition. By Section 158 (1) the jurisdiction of the Civil Court to interfere in any matter which a Revenue Officer is empowered by the Act to dispose of, or to take cognizance of the manner in which the power is exercised is taken away. In regard to partition the only questions within its cognizance are questions relating to title in the property of which partition is sought. Mr. Ishwar Das contends that the question raised by the appellant as to the widow's right to demand partition of her share before the Revenue authorities is, under the authoritative declarations of the law and custom in the rulings of this Court cited by him, one regarding her title. We are disposed at present to think that this is a rather strained interpretation of the word "title," the expression used being "title in any of the property." If this interpretation is correct the Financial Commissioner's view is wrong.

It must be held for purposes of this case that by reason of the dismissal of plaintiff's former suit the defendant is the undisputed successor to her husband's interest in the joint holding on a life tenure, and she is so recorded in the revenue papers.

Considering the importance of the subject, the question whether the new Land Revenue Act has effected any change in the law relating to partition and made the rulings of this Court in regard to the widow's right to claim partition while the previous Act was in force inapplicable should be referred to, and decided by a Full Bench. The Financial Commissioner's judgment appears to put his view of the law very clearly and forcibly.

We accordingly refer the following questions, and, to save the parties unnecessary trouble, the whole case, to a Full Bench—

- (1) Whether a suit of this description lies after the enactment of Act XVII of 1887?
- (2) Whether the question raised by the plaintiff is a question as to title in the property of which partition is sought.

The judgment of the Full Bench was delivered by

CHATTERJI, J.—The facts of the case appear from the order 24th Jany. 1899. of reference.

The questions before this Full Bench are two—

- (1) Whether a suit of this description lies after the enactment of Act XVII of 1887 ;
- (2) Whether the question raised by the plaintiff is a question relating to title in the property of which the partition is sought.

The second question may be dealt with first, for our reply to the first will in a great measure, if not wholly, depend on our decision on it.

The point ruled by the Financial Commissioner in No. 11 of 1895, Revenue, is that the widow of a landholder in the Punjab succeeding to a joint share in land belonging to her husband and duly recorded in the revenue papers is entitled to claim partition from her co-owners. This view was approved in No. 6, *Punjab Record*, 1896, Revenue. In neither case had the Financial Commissioner before him the precise points we are now considering. He held that a widow was entitled to claim partition under the existing Revenue Law, *viz.*, Section 111 of Act XVII of 1887, but we do not understand him to lay down that, given the facts that the widow's right to the joint share is admitted, and that it is duly entered in the Revenue Records, her right to claim partition is indefeasible by law so far as the other sharers are concerned, and subject only to the Revenue officer's discretion to grant it or not. He has only considered the question from the Revenue officer's point of view and had not to decide the right of the other co-sharers to object to the partition in the Civil Court, nor, if we understand him aright, has he decided it. It would seem, therefore, that if we held that the widow's claim is liable to be defeated by the objections of the male co-owner there would not necessarily be any conflict between his opinion and ours.

We agree with Financial Commissioner that a widow under the circumstances mentioned in his judgment is able to ask the Revenue officer for partition of her share under Section 111 of the Punjab Land Revenue Act. But we do not think there is any thing in that section read with the other relevant sections of the Act, *e.g.*, Sections 116 and 158, Clause (xvii), to show that her right is controlled only by the discretion of the Revenue officer. We are also unable with all deference to the learned Financial Commissioner to hold that the right is given to the widow because she is a "landowner" under Section 3 (2), though this argument was pressed before us with great force by respondent's counsel. The word used in Section 111

is "owner" not "landowner," and in our opinion the two terms are not synonymous. "Landowner" has a very wide signification and includes many persons whose interests in land are of a limited or ephemeral character, *e. g.*, a farmer or transferee for revenue purposes or one, not expressly mentioned in the clause, who is in possession of an estate or any part thereof or in the enjoyment of any part of the profits of an estate. Had it been used in Section 111 there would have been some ground for the contention that the widow's right to partition is indefeasible, for at all events her interest is much larger than that of the persons mentioned above.

The word "owner" has not been defined in the Act, and according to the accepted canons of interpretation we must, unless the context negatives such a construction, take it to have been used in its ordinary sense. Now the connotations of the term are somewhat indefinite, and it is commonly applied to persons whose rights in property are unlimited as well as those whose rights are more or less restricted. In its widest signification to use the language of Austin ownership means a "right over a determinate thing indefinite in point of time, unrestricted in point of disposition and unlimited in point of duration." The component rights of ownership fall under three heads, possession, enjoyment and disposition (*per* Sir M. Plowden, C. J., in No. 107, *Punjab Record*, 1887, page 246).

In actual life we do not always find the rights of ownership uncontrolled under all the three heads. The obligation to respect the rights of others and the restrictions imposed by law frequently limit the power of the owner to deal with his property. The right is widest in respect of movable and acquired immovable property, but in the Punjab among agriculturists custom does not allow the male owner in possession an unrestricted right of alienation of ancestral land to the prejudice of his male heirs. But though thus possessing a limited power of transfer for legal necessity he is all the same termed an owner in common parlance. As respects acquired land as well as ancestral land he is equally described as owner. The same remark applies to a widow succeeding to her husband's estate on a customary tenure. She is not strictly a life tenant, but her rights of alienation are restricted like that of the male holder as regards ancestral land, and the conditions constituting legal necessity are more stringent in her case. But she is also called an owner in the revenue records and in the language of common life. The word "owner" is thus ordinarily applied indiscriminately to persons having rights in property which are

in some cases plenary and in others restricted, and this must be understood to be the sense of the word in Section 111. A widow therefore is an owner, and in this case a joint owner under that section.

We have discussed this point at some length as one of Mr. Ishwar Das' arguments was that the word does not include such rights as a widow possesses in her husband's land to which she has succeeded for life.

As the defendant's widow is an "owner," it follows that she could apply for partition before a Revenue officer who, as such, was bound to grant her prayer unless he disallowed it in the exercise of his discretion, which he did not do. Plaintiff's objection that she is not entitled to claim partition by custom would avail and the Civil Court would have jurisdiction to give him relief only if the objection can be held to raise a question of title in the land sought to be partitioned.

After giving the matter our best consideration we are of opinion that the answer to this question must be one in the affirmative in favour of the plaintiff. The word "title" is sometimes synonymous with right and sometimes the correlative of it. A person who has a particular right in property is said to have a title in it. Thus a man who has the right to hold and cultivate certain land is said to have a title to it as a tenant. Partition is one of the modes of use and enjoyment of land held in joint ownership and the right of partition is a right appurtenant to ownership. It is possible to conceive of an owner who has not the right to demand partition, just as there are many who have not the right of unrestricted disposition. In such a case the limitation or defect is in the title of the owner. The plaintiff's contention that the defendant's widow has not by custom the right to demand partition of the property in dispute therefore amounts to an assertion that her title as owner is restricted in that respect. It therefore raises a question of title in the property sought to be partitioned.

This appears to have been held in several previous decisions of this Court in analogous cases. In No. 63, *Punjab Record*, 1892, the claim of a female holder of land to partition was opposed on the ground that she had by a private *razinama* accepted an allowance of grain, and that the plaintiff had therefore sunk a well and made improvements on the land, and it was held that the objection related to a question of title. In No. 82, *Punjab Record*, 1893, an objection that certain land was not liable to partition without the concurrence of all the sharers was held to

be one of this character. We also agree with the learned Judges who decided the latter case that the two descriptions of questions which can possibly arise when partition of land is sought before a Revenue officer, and which are given in Section 116 of the Punjab Land Revenue Act, are meant to be exhaustive and mutually exclusive, and this furnishes another argument in support of the view we are now taking.

As regards the first question, which had reference to Section 158, our answer is governed by our reply to the second. As the objection raises a question of title, we hold that the suit is maintainable in the Civil Court.

The above disposes of the questions referred to the Full Bench. But the whole case has also been referred to it, and we accordingly proceed to pass final orders.

There is no contention raised before us that the widow's right to partition is not restricted by custom, as was laid down in the previous rulings of this Court. As the plaintiff's suit is now held to be maintainable we think he must be granted the declaratory decree he asks for. Defendant would no doubt be entitled to claim separate possession of her share in the Civil Court without partition if she cannot otherwise conveniently and comfortably enjoy its usufruct, but she has actually made no claim of this kind, and we can therefore only leave this expression of opinion on record.

We accept the appeal and decree the plaintiff's claim without prejudice to defendant being allowed separate possession and enjoyment of her share by the Civil Court on her making out a case for such relief.

Parties will bear their own costs throughout.

Appeal allowed.

No. 83.

Before Mr. Justice Reid.

SUNDER SINGH,--(PLAINTIFF),--APPELLANT,

Versus

JIWAN RAM,--(DECREE-HOLDER),--AND MUSSAMMAT
LACHMI,--(DEFENDANTS),--RESPONDENTS.

} APPELLATE SIDE.

Case No. 779 of 1896.

Civil Procedure Code, 1882, Sections 274, 276—Validity of attachment.

On the 8th October 1888, the decree-holder applied for execution of his decree by attachment and sale of the whole of the judgment-debtor's immovable property, and the report of the attaching officer was that attachment had been effected on the 22nd October 1888 by beat of drum on the

spot and by affixing a notice, under Section 274 of the Civil Procedure Code, on the house of the judgment-debtor, situate on the spot. It did not, however, appear from the report that a copy of the notice was affixed in the court-house or in the office of the Collector of the District, and no evidence was adduced on this point. The plaintiff purchased the land in dispute from the said judgment-debtor on the 18th March 1891, and it was contended on his behalf that, in order to render the said sale to him invalid, the decree-holder was bound to prove that all the conditions of Section 274 had been duly complied with. It was proved that there had been litigation about the attachment before plaintiff's purchase, and that the latter's sale-deed was executed at Lahore, and not at Amritsar, where it would ordinarily have been executed.

Held, having regard to the circumstances of the case, that plaintiff had notice *aliunde* of the attachment, and that there was no reason to hold that the condition of Section 274 had not been complied with, or, in any case, that the attachment was not valid as against plaintiff.

The rule laid down in *I. B. L. R. (S. N.)*, 20, and *I. L. R., II All.*, 58 should not be strictly applied in this Province.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 21st April 1898.

Lajpat Rai, for appellant.

Birch, for respondent.

The judgment of the learned Judge in Chambers was as follows :—

13th Jany. 1899.

REID, J.—The question for consideration is whether the land in suit was under attachment, in execution of the respondent-decree-holder's decree, on the 18th March 1891, the date of its sale to the appellant by the judgment-debtor. On the 8th October 1888, the decree-holder applied for execution of his decree by attachment and sale of the whole of the judgment-debtor's immovable property, and the report of the attaching officer was that attachment had been effected on the 22nd October 1888 by beat of drum on the spot and by affixing a notice under Section 274 of the Code of Civil Procedure on the house of the judgment-debtor, situate on the spot. It does not appear from the report that a copy of the notice was affixed in the Court-house, or in the office of the Collector of the District, and no evidence has been adduced that the notice was so affixed.

For the appellant it is contended that the respondent was bound to prove that all the conditions of Section 274 had been complied with, in order to render the sale to the appellant invalid under Section 276 of the Code.

Indra Chandra Babu v. Agra and Masterman's Bank (I. B. L. R. S. N. 20) and Nur Ahmad v. Allas Ali (I. L. R., II All., 58) support this contention.

The pleader for the respondent relies on an unreported ruling of a Bench of this Court, in Civil Appeal 1348 of 1892, in a suit by a judgment-debtor to recover a house sold in execution of a decree against him, on the ground of certain irregularities in the sale, including failure to affix a copy of the notice under Section 274 in the Court-house or Collector's Office.

It was held that such failure did not invalidate the sale, the material conditions of Section 274, so far as the judgment-debtor was concerned, being the proclamation on the spot and the service of a notice on him. This obviously distinguishes the case from those quoted for the appellant, which were between attaching creditor and purchaser, but it was remarked in the judgment that the practice in the Jullundur District appeared to be for the copy of the prohibitory order intended for the Court-house to be kept with the file. The present case is from the adjoining District, Amritsar, and the practice in this Province appears to be very loose.

It is further argued for the appellant that the Revenue records prove that the decree-holder consented to the release from attachment of all but 25 *bighas* of land, which did not comprise the land in suit. This does not appear to be the case, an apparently unencumbered plot of land being selected for sale, as sufficient to satisfy the decree, but the attachment thereof being eventually set aside on the objection of a third person, who had purchased from the judgment-debtor before the 22nd October 1888. There is ample authority for holding that these proceedings had not the effect of releasing the rest of the property from attachment, and the fact that the decree-holder subsequently applied for fresh attachment of the land in suit does not deprive him of the benefit of the original attachment.

It appears that the property was encumbered, and that a larger area than would otherwise have satisfied the decree was consequently attached. The whole property being attached, the proceedings were not invalid by reason of the numbers of the fields not being specified.

The ruling of their Lordships of the Privy Council, in *Ramkrishna Das Surrowji v. Surf-un-nissa Begum* (I. L. R., VI Cal., 129) is in point, in so far as their Lordships expressed a doubt as to whether it was not for the party who relied on non-observance of due formalities in attachment to prove it, but is not in point as regards the respondent's plea that objections on the ground of such non-observance are too late, the present suit being based on the ground that no valid attachment was effected.

Having regard to the circumstances of this case, I do not think that the rule laid down in 1, B. L. R. and I. L. R., II All., should be strictly applied here.

It does not appear from the reports of those cases that the purchaser had notice *aliunde* of the attachment, and I have no doubt that the appellant had notice. There had been litigation about the attachment before the appellant purchased, and his sale-deed was executed at Lahore, instead of at Amritsar, where it would ordinarily have been executed.

There was apparently no serious suggestion, when the method of attachment was fresh in the memory of those who could prove it, that all the conditions of Section 274 had not been complied with, and I see no reason to hold that the conditions of the section were not complied with, or in any case to hold that the attachment was not valid as against the appellant.

The appeal fails and is dismissed with costs.

Full Bench.

No. 84.

Before Mr. Justice Clark, Chief Judge, Mr. Justice Chatterji and Mr. Justice Anderson.

HARVANS SINGH,—(PLAINTIFF),—APPELLANT,

Versus

HARNAM SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 759 of 1897.

Custom—Alienation—Suit by son in presence of his father to contest an alienation by an agnate—Locus standi of plaintiff—Sodhi Khatri of Tahsil Zira, Ferozpur District.

In a suit by plaintiff to contest an alienation by his father's uncle, it appeared that plaintiff's father was alive, but refused to join in the suit. The question referred to the Full Bench was whether, under such circumstances, plaintiff had any *locus standi* to sue.

Held, that under Customary law by which the parties were governed, plaintiff was entitled to sue to set aside the alienation in question, and that the District Judge had erred in dismissing his suit on the ground that he had no *locus standi*.

First appeal from the order of Maulvi Muhammad Husain, District Judge, Ferozpur, dated 1st April 1897.

Oertel, for appellant.

Sham Lal, for respondents.

APPELLATE SIDE. {

The judgment of the Full Bench was delivered by

CHATTERJI, J.—The material facts are stated in the order 27th Jany. 1899. of reference. Harnam Singh, the alienor is the grandson of the common ancestor, Chanan Singh, while plaintiff is Chanan Singh's great-grandson's son. Sundar Singh, plaintiff's father, is alive, but will not join in the suit to contest his uncle's alienations, though the District Judge finds that this is not shown to be due to collusion.

The question before the Full Bench is, has plaintiff a *locus standi* to sue to set aside the alienations?

We are of opinion that the answer should be in the affirmative. Plaintiff as a remote reversioner would be able to sue in the presence of a nearer reversioner if the latter colluded with the alienor or was a person with limited rights or had consented to, or acquiesced in, the alienation or refused to sue without sufficient cause, as plaintiff's father has done in the present case. Does the fact that the nearer reversioner here is the plaintiff's father make any difference? Whatever might be the consequence if Hindu law applied,—a point we do not decide—we consider that under Customary law this would not affect the plaintiff's right of action. Plaintiff is in the line of heirs to Harnam Singh, though his father would precede him in the succession if he was alive when it opened out. Plaintiff thus has an interest in the property which is apparent at the time of suit, and as his father will not take any steps to protect the reversion, there is no good reason why plaintiff should not, under the general rule above cited, come forward to save that right for himself. Moreover, the right to inherit land and the right to protect that land from improper alienation do not stand on exactly the same footing under Customary law. The former is derived through the immediately preceding ancestor, but the latter is a right which accrues to every descendant of the original holders of the land. To use the language of Sir Meredith Plowden in No. 107, *Punjab Record*, 1887, F. B., "there exists some sort of residuary interest in all the descendants of the first owner or body of owners, however remote and contingent may be the probability of some among such descendants ever having the enjoyment of the property." This is the prevailing sentiment among the agricultural tribes in this Province, and forms the bed rock on which the right of agnates to restrict improper alienation ultimately rests.

In this connection the distinction drawn between the right to possession and the right to sue for possession in page 79 of the

Full Bench Judgment, No. 18, *Punjab Record*, 1895, and the reasons given therefor are instructive and may be consulted with advantage. Some of the reasoning would by way of analogy apply to the present discussion.

If Sundar Singh had transferred some of the ancestral land in his own possession without necessity, there is no doubt plaintiff would have been able to sue to protect his reversionary rights. By parity of reasoning he should be able to intervene when Sundar Singh allows his rights of reversion in Harnam Singh's land to be placed in jeopardy by permitting Harnam Singh's alienation to pass without challenge.

It is contended for the respondents that the parties here are Sodhi Khatriis and governed by Hindu law, from which therefore the rule of decision should be deduced. But the reference is made under Customary law, and the answer of the Full Bench must be framed accordingly. Moreover, custom is the primary rule of decision in a matter of this kind under the Punjab Laws Act. The parties never set up Hindu law as governing them and they are land-holding Sikh Khatriis in a village in the Muktsar *tahsil* of the Ferozepore District. In No. 50, *Punjab Record*, 1895, it was found that Sodhi Khatriis of that district were governed by custom and a childless male proprietor was held to be precluded from alienating ancestral land without necessity. We see no reason to take a different view, nor can the point be raised at this stage.

The whole case has been referred to the Full Bench, and in accordance with our opinion stated above, we hold that the District Judge has wrongly decided that plaintiff had no *locus standi* and dismissed his claim. The case must be heard and decided on the merits.

We accept the appeal under Section 562, Civil Procedure Code, and return the case to the Court below for a fresh decision with reference to the above remarks. Court-fee on the petition of appeal will refunded. Other costs will abide the event.

Appeal allowed: cause remanded.

No. 85.

*Before Mr. Justice Clark, Chief Judge.*LALA DHOLAN DAS AND ANOTHER,—(PLAINTIFFS),—
PETITIONERS,*Versus*

RALYA SHAH,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Case No. 1738 of 1898.

Provincial Small Cause Court Act, 1887, Section 25—Revision—Wagering transaction—Written contract—Admissibility of evidence to prove that contract was void under Section 30 of the Contract Act—Evidence Act, 1872, Section 92.

The Judge of the Small Cause Court dismissed plaintiffs' suit on the ground that the evidence proved that the written agreement sued upon, which purported to be one for sale of silver, was not a *bonâ fide* transaction, no actual interchange of silver being contemplated, but merely an adjustment of profit and loss with reference to a difference in the market rates. Plaintiffs applied to the Chief Court for revision of the order of dismissal on the ground, (1) that there was no evidence to show that delivery of silver was not intended, and (2) that oral evidence was inadmissible to contradict the terms of the written agreement according to which silver was to be delivered.

Held, that as there was evidence on which the Judge of the Small Cause Court might base his finding that the transaction was a wager, that finding should not be disturbed on revision.

Held, further, that the oral evidence was admissible, under the first proviso to Section 92 of the Evidence Act, for the purpose of invalidating the written agreement.

I. L. R., XVII Mad., 480, and *I. L. R.*, XII Bom., 585, followed; *I. L. R.*, IX Cal., 791, not followed.

Petition for revision of the order of Lala Ram Nath, Judge, Small Cause Court, Amritsar, dated 1st July 1898.

K. P. Roy, for petitioners.

Lal Chand, for respondent.

The facts of the case appear from the judgment of the learned Chief Judge, which was as follows:—

CLARK, C. J.—The plaint in this case was that on 13th September 1897, defendants sold a case of silver 2,800 *tolas* in weight to plaintiff, at Rs. 71 per 100 *tolas*, for delivery on 20th or 21st September, and executed a *satta* to that effect.

Defendant did not deliver the silver, and as silver was selling at Rs. 81 per 100 *tolas* on 21st September 1897, plaintiffs claimed the difference of rates amounting to Rs. 280.

Defendant pleaded that this was a wagering transaction, and that he was not liable.

The Judge, Small Cause Court, fixed issues :

Whether the contracts on *satta* for sale of silver were *bona fide* transactions, or of a wagering character.

Plaintiffs had eight similar suits against different persons and they were all decided by the present decision.

The Judge, Small Cause Court, found "on the facts and evidence on the record, I am of opinion that no actual interchange of silver was contemplated in the contracts in dispute, but that only an adjustment of profit and loss with reference to the market-rate of the goods was intended, and this fact renders the contracts void within the meaning of Section 30 of the Contract Act," and dismissed the suits.

Plaintiffs have applied to this Court for revision on the grounds—

- (1) That there was no evidence on which to come to the conclusion that delivery of the silver was not intended.
- (2) That oral evidence was not admissible to contradict the terms of the *satta* according to which the silver was to be delivered.

The first question that arises is whether a revision lies in this case.

The law as stated in *I. L. R., XVIII Mad.*, 306, is clear that agreements between buyers and sellers of shares and stocks to pay or receive the differences between their prices on one day and their prices on another day are gaming and wagering transactions, and in India are void under Section 30 of the Contract Act.

There is no difference where the subject of the bargain is silver instead of shares or stock. The essential point is that in agreements by way of wager there is no intention at the time when they are made to sell or deliver, but only to speculate and pay the difference.

The Munsif in this case made a long investigation, examined both parties and such witnesses as they chose to produce, including the broker who effected the transaction between the parties and other persons who had been making silver bargains about the same time. The evidence in this case was similar in its kind to the evidence on which the Judges in *I. L. R., XVII Mad.*, 480, and *XVIII Mad.*, 306, decided that a transaction was a wager.

I am of opinion, therefore, that there was evidence on which the Judge, Small Cause Court, might base his finding that the

transaction was a wager, and that that finding should not be disturbed on revision.

The next question is whether any evidence should have been admitted to contradict the terms of the *satta*. Mr. K. P. Roy, for plaintiffs, relies upon *I. L. R.*, *IX Cal.*, 791. That judgment was considered in *I. L. R.*, *XVII Mad.*, 480, and it was held agreeing with *I. L. R.*, *XII Bom.*, 585, that under Proviso 1, Section 92, of the Evidence Act, oral evidence was admissible to prove any fact that would invalidate a document, and that it was for that purpose that oral evidence had been tendered and admitted in that case.

I think here also the oral evidence was admitted to invalidate the *satta*, and that it was admissible for this purpose.

If such evidence were excluded parties would be able, by drawing up a *satta* like this one, to defeat the whole provision of the law as to wagers.

Cases are quoted on page 433, Field's Law of Evidence, 5th Edition, which support the view taken by me.

I hold then that no revision lies and dismiss the petition with costs.

Application dismissed.

No. 86.

Before Mr. Justice Clark, Chief Judge.

MUHAMMAD HUSAIN,—(VENDOR-DEFENDANT),—
PETITIONER,

Versus

ABDUL RAHMAN AND ANOTHER,—(PLAINTIFFS),—AND
MUHAMMAD HUSSAIN,—(VENDEE-DEFENDANT),—
RESPONDENTS.

} REVISION SIDE.

Case No. 1180 of 1898.

Appeal and cross-objections—Power of appellant to defeat cross-objections by withdrawing from appeal—Case remanded to lower Appellate Court under Section 562, Civil Procedure Code—Default of appellant—Proper order for lower Appellate Court to pass.

The first Court having decreed plaintiffs' suit for pre-emption at Rs. 492, plaintiff appealed to the Divisional Court as to the price, and defendant cross-objected that plaintiffs' suit had not been filed by a duly qualified agent. The Divisional Court dismissed the suit on the latter ground, whereupon plaintiffs appealed to the Chief Court, which remanded the case to the lower Appellate Court, under Section 562 of the Civil Procedure Code, for decision as to whether plaintiff's alleged agent had been duly authorised to institute the suit, and for disposal of the appeal if the suit

were found to be within limitation. At the date fixed for hearing on the remand, plaintiff failed to appear, whereupon the lower Appellate Court passed an order to the effect that the appeal must be dismissed for plaintiff's default, and that, therefore, defendant's cross-objection failed, and could not be entertained.

Held, that inasmuch as the case had been remanded by the Chief Court merely in order to give plaintiff an opportunity of proving that his alleged agent was duly authorized to institute the suit, the lower Appellate Court should have held, on plaintiff's default, that the previous order of the Divisional Court stood.

Held, further, that when once an appeal has come to a hearing, the Court is seized of the appeal, and an appellant cannot in such a case defeat a cross-objection by withdrawing from the appeal.

Petition for revision of the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 25th March 1898.

Muhammad Shafi, for petitioner.

Oertel, for respondents.

The judgment of the learned Chief Judge was as follows :—

30th Jan'y. 1899.

CLARK, C. J.—The first Court decreed for pre-emption at Rs. 492. Plaintiff appealed as to price, and defendant cross-objected as to plaintiff's suit not having been regularly filed.

Divisional Judge dismissed plaintiff's suit on the ground that the plaint had not been presented by a duly qualified agent.

The Chief Court on plaintiffs' appeal said that plaintiffs should be given an opportunity to prove that his agent, Faiz Muhammad, had been duly authorized to institute the suit, and remanded the case under Section 562, Civil Procedure Code, for decision of this point, and for disposal of the appeal if the suit is found to be within limitation.

The Divisional Judge has passed the following order :—“ As “ the appellants are not present and the appeal must be dismissed the cross-objection cannot be entertained.

“ The appeal is accordingly dismissed for default with costs, “ and the cross-objection fails.”

Defendant has applied for revision of this order, and this is the case now before me.

I think that the Divisional Judge has misunderstood the order of this Court, which was to the effect that if plaintiff proved that the agent had been duly authorized to present the plaint, in that case he was to dispose of the appeal.

As plaintiff did not prove the issue which he was required to prove, I think the Divisional Judge should have held that the previous order of the Divisional Judge stood.

The question arises whether the cross-objection could be entertained in default of appellant-plaintiff. For defendant *I. L. R.*, IX Bom., 38, XXIII W. R., 229, are relied upon; and for plaintiff, XXIII W. R., 575, *I. L. R.*, XVII All., 518; *Punjab Record*, No. 53 of 1896.

After considering these authorities, I hold that when once an appeal has come on to hearing the Court is seized of the appeal, and appellant cannot defeat the cross-objection by withdrawing from the appeal.

In this case the Divisional Judge had actually dismissed the suit on defendant's cross-objection.

It is urged for plaintiffs that the remand under Section 562 had the effect of renewing the appeal, and gave plaintiffs the right to withdraw from the appeal and prevent the hearing of cross-objection.

I do not think that the remand under Section 562, Civil Procedure Code, had this effect; it threw the burden on plaintiff of proving a certain matter, and if he defaulted in that, he was to be in no better position than he was before he appealed to the Chief Court.

I accept this revision, and direct that the decree of the Divisional Judge of 19th June 1895 shall stand.

Plaintiff will bear all costs subsequent to the decree of this Court of December 9th, 1897.

Application allowed.

No. 87.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

HAKIM AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

JAGAT SINGH AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1430 of 1897.

Custom—Succession—Issue of woman whom a man could not legally marry, but treated by him as his wife—Varaich Hindu Jats of tahsil Gujranwala—Riwaj-i-am.

Found, that no custom had been proved amongst Varaich Hindu Jats of Gujranwala tahsil whereby, when a proprietor has throughout his life lived with a woman whom he could not legally marry and has treated her as his wife and his sons by her as ordinary sons, such sons succeed to his estate on his death.

Further appeal from the order of Sardar Gurdial Singh, Man, Divisional Judge, Sialkot Division, dated 16th February 1897. Lal Chand, for respondents.

The judgment of the Court was delivered by

10th Feby. 1899.

ROBERTSON, J.—This case was remanded by Sir Charles Roe and Mr. Frizelle, Judges, for enquiry regarding a point of custom. It appears that Attar Singh, plaintiff's brother, lived for many years with *Mussammat Bhagan* as husband and wife. *Mussammat Bhagan* was a Mussalman, and Attar Singh himself did not, from a legal point of view, become a Mussalman until a year or so before his death. The Bench of this Court in their order of April 21, 1898, found as a fact that Attar Singh remained a Hindu Sikh until 1891, and that there could be no lawful marriage between a Sikh and a Mussalman. It also noticed the Muhammadan law of acknowledgment, pointing out that it does not cover the case of a man who desires to make an adoption* by declaring another man's son to be his, nor does it enable a man to set at naught the marriage law by declaring that the offspring of a marriage which the law forbids is legitimate.

It was found as a fact that *Mussammat Bhagan* had been treated as a wife and the sons, defendants, as ordinary sons. It was therefore considered that the real question is, "Is the *Riwaj-i-am* correct in stating that by custom the sons are "entitled to succeed." The case was, therefore, remanded for further enquiry, and the issues stated thus:—

"Amongst the *Varaich Hindu Jats* of the *Gujranwala tahsil*, when a proprietor has throughout his life lived with "a woman whom he could not legally marry, and treated her "as his wife and has treated his sons by her as ordinary sons, "do these sons by custom succeed to his estate on his death?"

To this remand a return has now been received.

The actual entries in the *Riwaj-i-am* are as follows:—In that prepared in 1868, Q 6, the entry states that illegitimate children of a woman with whom a marriage would have been possible do not succeed, but may receive a gift accompanied by possession during their father's life-time. In answer to Q 7, the same answer is given regarding the children of women with whom marriage would have been unlawful. Under this second question a case of succession which occurred by illegitimate sons of a Mussalman woman is given as an exception: this occurred in the case of *Sahib Ditta's* descendants in *Mauza Mari*, a case quoted by the Lower Court, as will be noticed below.

In the *Riwaj-i-am* of 1891-92, under Q 76, the question is, "When a marriage has taken place which, on account of relationship, or former marriage, or difference in caste (Jat), etc. (*wagairah*), or for any other cause, was not lawful, "is the offspring of such union to be held legitimate or not" ? The answer is that the offspring are to be considered illegitimate, but are to inherit an equal share with legitimate offspring. This entry, it will be seen, is different from the entry of 1868.

The case was sent to the Additional District Judge of Gujranwala, who appointed the four *Tahsildars* of the District as Commissioners to report as to the existence or the contrary of the custom set out in the issue referred. The *Tahsildar* of Gujranwala called together a number of *zaildars* and *lambardars*, and reports that opinion was against the existence of such a custom, and to the effect that if a *Varaich* Sikh married a Mussalman her children would not succeed. The *Naib-Tahsildar* of Hafizabad, after collecting a number of *lambardars*, etc., makes the same report. There are no *Varaich* villagers in this *tahsil*. *Tahsil* Khangah Dogran is made up of new canal settlements, and was not a useful field for enquiry, but the *Naib-Tahsildar* makes the same report as above, but notes that one of the *lambardars* called mentioned a case in Amritsar *tahsil* where a son of a *Mussalman* wife by a Sikh succeeded to something from his father. The *Tahsildar* of Wazirabad, in which are no *Varaich zamindars*, also reports against the existence of the alleged custom. A *lambardar* mentions the case of one Joga, who had a *Mussalman* woman living with him, whose child was not allowed to succeed. The Additional District Judge, Khan Ahmad Shah, however, himself reports in favour of the custom, giving eight illustrations. In regard to these, it was pointed out by the respondents' counsel, that in the first case, that of one Ram Singh who married *Mussammam* Umar Bibi, it appears from Buta's own statement, Buta being the son who succeeded, that before Buta was born, his father had turned *Mussalman*. The second case in *Mauza* Shama was clearly a case of gifts followed by possession. The third case, that of Sahib Ditta in Mari, is actually given as an exception, in the old *Riwaj-i-am*, to the rules then existing. The fourth is a case of *Mauza* Lohianwala; one Sham Singh had two wives, a Hindu and a *Mussalman*. Hira Singh was born of the Hindu wife, and Ladda, Haka, Arura were born of the *Mussalman* wife. The children succeeded together according to the *pagwand* custom some 30 years ago. This village is only one mile from defendants' village. The Lower Court reported in favour of the

custom, and we have now to consider whether it can be held to be established or not.

Recent decisions of this Court, notably 33 of 1896 and 73 of 1897, have gone some distance in the direction of supporting custom proved to exist whereby the children of connections not commenced by formal marriage ceremonies have been held entitled to succeed to their father's estate. In these cases, however, it has rather been the view that cohabitation and the treatment of the woman by the man in all respects as a lawful wife, and the treatment of the children by their father in all respects as his lawful children, takes the place of the marriage ceremony, and does in fact by custom constitute a marriage, and that such a view tends rather to morality than immorality on the whole, which has led to the upholding of the rights of the children to succeed. It is, however, a great step further to hold that a connection by cohabitation between a man and a woman between whom marriage is, to their own knowledge throughout, distinctly unlawful, is to give a full right of succession to illegitimate children. We are not to set up an abstract code of morals to be followed by agricultural Sikhs, but we are distinctly obliged to recognize as such, and to refuse to accept as proved, any custom which is obviously and clearly immoral, and when it is sought to prove the existence of a custom regarding inheritance which is at least of very doubtful morality, it is necessary to scrutinize the proof of its existence very carefully, and it must not be found to be binding if contrary to justice, equity, or good conscience. The decision that the offspring of the cohabitation of a Sikh man and a Mussalman wife, who could have none of the rights of husband and wife towards each other, are to be held entitled to succeed to their father's estate as if they were legitimate sons can only be come to on the clearest evidence that this is in fact the custom, and we cannot find any such clear proof of custom in the file before us. The Additional District Judge has reported in its favour, but each one of the commissioners appointed reported against it, and out of four illustrations given three clearly are of no weight, and the fourth is an old and doubtful case, in regard to which it appears no opportunity for rebuttal was given to the other side. For these reasons we hold that it has not been proved that amongst Varaich Hindu Jats of the Gujranwala *tahsil* when a proprietor has throughout his life lived with a woman whom he could not legally marry and treated her as his wife and has treated his sons by her as ordinary sons, that such sons succeed by custom to his estate on his death.

We would remark further that the entry No. 76 in the *Riwaj-i-am* of Gujranwala seems to deal with a somewhat different state of affairs from that proved to exist in this case. It contemplates a marriage having taken place which for some reasons, such as those recited, subsequently proves to be no legal marriage. This entry, therefore, it would appear, does not accurately cover the case now before us, but refers to a somewhat different class of cases.

We reject the appeal with costs.

Appeal dismissed.

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No. 88.

Before Mr. Justice Reid.

MOTI RAM,—(PLAINTIFF),—PETITIONER,

Versus

KAMMAN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} REVISION SIDE.

Case No. 1238 of 1898.

Pre-emption—Conditional decree—Payment of purchase money—Appeal—Decree of Appellate Court confirming decree of first Court, but silent as to time for payment of purchase-money.

The first Court granted plaintiff a decree for possession of certain land on payment by him of Rs. 300 within one month from the date of decree. Plaintiff appealed to the lower Appellate Court on the question of price and costs. The lower Appellate Court dismissed the appeal and concluded its judgment as follows:—"I observe that plaintiff admits not "having paid Rs. 300 into Court as directed by the 16th April 1898. This "should be taken into account by the lower Court in the event of plaintiff "now desiring to pay in the money. I have not thought it right to extend "in any way the time within which the plaintiff should have liberty to "deposit his money." Forty-eight days after the date of the latter decree plaintiff filed an application for revision in the Chief Court, but did not deposit the said purchase money or any part thereof.

Held, following *Rup Chand v. Shams-ul-Jahan* (I. L. R., XI All., 346), that inasmuch as the decree of the first Court had allowed one month for payment of the purchase money, and the appeal against that decree had been dismissed without any fresh period for payment being expressly allowed, the Appellate decree must be taken to have incorporated the terms of the original decree, that the period of one month allowed for payment must be calculated from the date of the Appellate decree, and that payment by the decree-holder within one month of that date would have been in time.

Under the circumstances of the present case, the Chief Court granted the decree-holder a further period of 14 days from the date of its order for such payment.

Petition for revision of the order of A. Kensington, Esquire, Additional Divisional Judge, Umballa Division, dated 17th May 1898.

S. P. Roy, for petitioner.

Jaishi Ram, for respondents.

The judgment of the learned Judge was as follows :—

20th Feby. 1899.

REID, J.—The plaintiff-petitioner sued for pre-emption of certain land on payment of Rs. 64-12-0, and obtained a decree for possession on payment of Rs. 300. He appealed to the lower Appellate Court on the question of price and costs, and his appeal was dismissed.

The judgment of the lower Appellate Court terminated thus: "I observe that plaintiff admits not having paid Rs. 300 "into Court as directed" (by the Court of first instance) "by "the 16th April 1898. This should be taken into account by "the lower Court, in the event of plaintiff now desiring to pay "in the money. I have not thought it right to extend in any "way the time within which the plaintiff should have liberty "to deposit his money."

It is contended that the lower Appellate Court acted with material irregularity in directing the Court of first instance not to receive the purchase money if paid in after the decree of the lower Appellate Court had been passed, inasmuch as one month having been allowed by the Court of first instance, the decree-holder was entitled to pay in the money within one month of that decree being confirmed in appeal in the event of no time being fixed by the Appellate decree.

This contention has force.

Counsel for the petitioner relies on No. 10, *Punjab Record*, 1895, which approved *Rup Chand v. Shams-ul-Jahan* (I. L. R., XI All., 346), in which it was held that where the decree of the Court of first instance allowed one month for payment, and the appeal against that decree was dismissed, without any fresh period for payment being expressly allowed, the Appellate decree must be taken to have incorporated the terms of the decree of the Court of first instance, that the period of one month allowed for payment must be calculated from the date of the Appellate decree, and that payment by the decree-holder within one month was in time. The pleader for the respondent relies on an *obiter dictum* of Rivaz, J., in No. 67, *Punjab Record*, 1895, in these words: "If the Appellate Court considers the first Court's decree "correct in all particulars, and upholds it in its integrity, the "plaintiff will then probably find himself without remedy.

"But he takes this risk when he elects to appeal without depositing the full purchase money." The question discussed was not before the Court, and was purposely left open. The actual question for decision dealt with Sections 17 and 18 of the Punjab Courts Act, which were repealed before the suit with which I have to deal was filed. Other rulings of this Court, decided before the repeal of those sections, are not in point, and need not be referred to, although quoted for either side.

Punjab Record, No. 47 of 1898, ruled that the omission to pay within the time allowed was not cured by the silence of the decree as to the consequence of failure to pay, and does not help the petitioner. This case and No. 10, *Punjab Record*, 1895, were in execution of pre-emption decrees.

No authority opposed to the case in *XI All.* has been cited for the respondent except the *obiter dictum* in No. 67, *Punjab Record*, 1895, already referred to. The Allahabad case was decided by a Judge whose decisions in pre-emption cases carries great weight, and in it various authorities are cited in support of the view adopted. I have no hesitation in following it, and in holding that the petitioner was entitled to possession on paying the price fixed into Court within one month of the date on which the decree of the lower Appellate Court was passed.

It does not appear from the record that any attempt was made to pay the money into Court before the expiry of one month from the date of the decree of the lower Appellate Court, and the application for revision was not filed in this Court until the expiry of forty-eight days from that date.

Having regard to the fact that the petitioner, who is a petition-writer and has drawn up his petition extremely badly, probably considered it useless, in the face of the judgment of the lower Appellate Court, delivered on the 17th May 1898, to attempt to pay the price fixed into Court, and to the time which has elapsed since the date of the decree of the Court of first instance, I allow the petitioner fourteen days from this date for such payment. The other grounds taken in revision have no force. The parties will pay their own costs of this Court.

Full Bench.

No. 89.

Before Mr. Justice Clark, Chief Judge, Mr. Justice Chatterji
and Mr. Justice Gordon Walker.

APPELLATE SIDE. {

KARAM DIN,—(PLAINTIFF),—APPELLANT,

Versus

SHARAF DIN,—(DEFENDANT),—RESPONDENT.

Case No. 456 of 1896.

*Punjab Tenancy Act, 1887, Sections 53, 56, 60—Unauthorised alienation
of occupancy rights—Customary right of collaterals to object to alienation.*

Held, by the Full Bench, that when an occupancy tenant has not complied with the provisions of Sections 53 and 56 of the Tenancy Act, 1887, by giving notice to the landlord of his intention to alienate or obtaining the landlord's previous consent in writing, the alienee obtains no indefeasible title to the tenancy under the Act, such alienation being voidable under Section 60 of the Act at the instance of the landlord, or by a collateral under customary law if the collateral is able to establish the custom.

In considering whether such custom exists the Court may take into consideration the custom applicable as regards alienations of proprietary rights, a very strong inference arising from the existence of the custom in the latter case that it exists also in the former case.

*Further appeal from the order of A. Christie, Esquire, Divisional
Judge, Jhelum Division, dated 4th March 1896.*

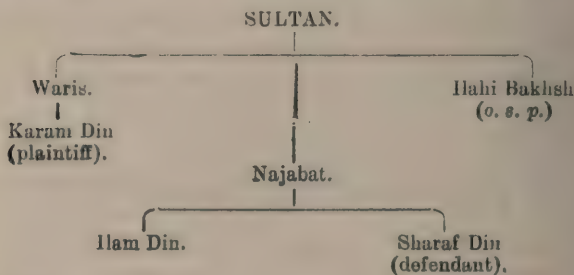
Sham Lal, for appellant.

Krishen Singh, for respondent.

The questions involved were referred to a Full Bench by
the following order of the Division Bench.

27th Nov. 1898.

GORDON WALKER, J.—The parties and the deceased Ilahi Bakhsh whose estate is in dispute are related as shown below :—



The property in dispute is an occupancy tenancy, which belonged to Ilahi Bakhsh and is now in possession of defendant Sharaf Din, his nephew. Plaintiff Karam Din is the son of another brother and claims to succeed to half of it. On the death of Ilahi Bakhsh the landlord sued defendant contesting his

right to succeed, but the suit was dismissed on the ground that Sultan, the common ancestor, had occupied the land. In the present case defendant has set up an adoption and a deed of gift by the deceased.

The first Court decreed plaintiff's claim, holding that the adoption was not proved and that the gift was invalid. The Divisional Judge dismissed the suit of plaintiff on the strength of the ruling in *Punjab Record*, No. 68 of 1894, of which he quotes a portion. He perhaps failed to notice that that decision was under the old Act, and further in this case there has been no consent on the part of the landlord, so that the donee is certainly not "in possession by the act of the landlord."

In *Punjab Record*, No. 31 of 1896, which was a Full Bench ruling, the occupancy tenant had sold his rights to the landlord, and in that case it was held that a suit by collaterals to have the alienation declared of no effect as regards their rights as reversioners was not maintainable. That was the only point really involved, but the views expressed by all three learned Judges in their judgments in that case appear to have gone beyond what was necessary for its decision. Mr. Justice Rivaz, while pointing out that the question was not really before the Court, was of opinion that where an alienation takes place "unauthorised by the landlord, but unchallenged by him" (that is the present case) "it would be open to the heirs entitled to succeed under Section 59 of the Act to question the alienation if they could establish a custom giving them the right to do so in the case of an occupancy holding." In my opinion there can be no doubt that it was at all events open to plaintiff in this case to challenge the gift made by the deceased in favour of one of his nephews to the exclusion of the other branch, and the present suit is maintainable. But the really important question is that suggested by the words italicised in the above quotation. The learned Chief Judge in his judgment remarked that the reversioners "would, however, have to prove that by custom they could restrain the alienation, and it would not necessarily follow that if the power of alienating ancestral property was restricted, the power of alienating a tenancy would be equally so."

Section 59 (2) of the present Act provides that "as amongst . . . collateral relatives . . . the right shall . . . devolve as if it were land left by the deceased in the village in which the land subject to the right is situate." A very important question appears to be involved here, viz., whether the clause quoted just above merely indicates the line of succession in which the tenancy will devolve, or whether it has a wider meaning and puts the

succession to occupancy right (including the power to challenge any attempt to interfere with it where the landlord is not concerned) on the same footing as if they were proprietary rights in land. The latter was clearly not the view which the learned Judges were prepared to favour in *Punjab Record*, No. 31 of 1896, but their opinions on this point are the nature of *obiter dicta*, and it seems desirable to have an authoritative ruling on the point. It would in the great majority of cases be practically impossible to prove a custom restricting the power of alienation *in respect of occupancy rights only* and without preference to custom in respect of proprietary rights. The question comes to be this, must the field of inquiry as to custom in cases like the present one be limited to instances concerning occupancy rights, or does Section 59 (2) put questions that arise in connection with succession to occupancy rights on the same footing as those connected with succession to proprietary rights in land?

In view of *Punjab Record*, No. 31 of 1896, and the importance of the question, I think that the case might be referred to a Full Bench.

CLARK, C. J.—I agree to the above reference.

The following judgments were delivered by the learned Judges who constituted the Full Bench.

14th March 1899.

CHATTERJI, J.—The facts of this case and the points to be decided sufficiently appear from the order of Mr. Justice Walker.

I agree with Mr. Justice Walker that the opinions of the late Chief Judge, Sir Charles Roe, and Mr. Justice Rivaz expressed in their judgments in the Full Bench case No. 31, *Punjab Record*, 1896, to the effect that where an alienation of an ancestral occupancy right by the tenant is unauthorised by the landlord but is not contested by him it is open to the collaterals of the tenant to object to it provided they can establish a right to do so by custom are *obiter dicta*. This remark would apply with greater force to the observation of the learned Chief Judge that it did not follow that because "the power of alienating ancestral property was restricted, the power of alienating a tenancy would be equally so." The true point decided is stated in a few words in the judgment of Mr. Justice Frizelle to be that a tenant has an absolute right of alienation unrestrained by any one, if he complies with the provisions of Sections 53 and 56 of the Tenancy Act. So far the Act must be held to be a bar to any claim on the part of the tenant's agnates to contest a transfer of his right.

The only case in which the right of objection is unaffected by the Act is that mentioned by the two learned Judges first quoted, *viz.*, where the tenant has not complied with the provisions of the Act but the landlord nevertheless has completely stood aside. The questions before us can only arise in a case of this kind.

Having regard to the wording of Sub-section (2) of Section 59, I do not think it can be held to indicate even indirectly that the right of challenging improper alienations of the tenant's right is put on the same footing as if it was proprietary right in land. It means to lay down a rule of succession among descendants and collaterals claiming under the previous sub-section, and the expression "as if it were land" appears to me to have been used for the sake of brevity alone.

But though the Act does not in my opinion throw any light on the question before us, it appears to me at the same time not to preclude any resort to general principles for the decision of that question.

In regard to alienation of proprietary right in ancestral agricultural land we generally find that the male owner in possession is subject to restriction. The persons who possess the power of restriction are his agnates in order of propinquity to him, the foundation of this right being to quote the words of Sir Meredyth Plowden in No. 107, *Punjab Record*, 1887, "that in respect of ancestral immoveable property in the hands of any individual, there exists some sort of residuary interest in all the descendants of the first owner or body of owners The owner in possession is not regarded as having the whole or sole interest in the property and power to dispose of it so as to defeat the expectations of those who are deemed to have a residuary interest, and who would take the property if the owner died without disposing of it."

This law had its origin in settlements of tribes or conglomerations of them over large tracts of land and in villages which were held by the settlers or their descendants for generations, but it is of wider application and applies equally to holdings occupied or acquired by individual proprietors. For instance suppose a Punjab agriculturist belonging to a tribe or resident in a locality in which the custom prevails purchases a plot of land today there can be no doubt that it will be ancestral property in the hands of his grandsons, and lineal as well as collateral male agnates of the actual holders would have the right of controlling alienations by them.

In short as respects ancestral land to which the custom applies the right of restricting alienations is possessed only by those male agnates who are the apparent, presumptive or potential heirs of the holder.

The term ownership, strictly speaking, signifies unlimited right of possession, enjoyment and disposition. It is obvious that such ownership and the custom above spoken of are mutually inconsistent. In respect of land therefore governed by the custom proprietary right is understood in a more limited sense, but even this meaning is by no means uniform. In some tribes the right of the male owner to alienate without necessity is absolutely restricted. In others he can give away a small part for religious uses or make some distinction among his heirs. In certain tribes again he can select one of his heirs and give his whole property to him, while in a few the sons have the right of controlling dispositions even of acquired agricultural land by the father. Yet all these persons are classed under the category of owners.

Occupancy right is a permanent interest in agricultural land the character of which varies greatly in different localities and under the provisions of the law. In some districts, *e.g.*, where the rainfall is scanty and the facilities for cultivation few, the right is scarcely distinguishable from proprietary right. In some places (see records of the earlier Settlements of South Punjab Districts) they pay no rent to the proprietor, pay their revenue direct to Government, and have a right to share in the *shamilat* when partition takes place; in others their status, save in the permanent character of their interest in their holdings, is not much superior to that of tenants-at-will. The origin of the right also is in many cases similar to that of proprietary right in land. I apprehend the typical cases are those in which the cultivators settled with the founders of a village or broke up waste land at their invitation subsequently to the foundation in order to help them to meet the revenue demand or in which proprietors lost their ownership involuntarily to others without losing their occupation.

Considering the varying connotation of the term ownership itself in this Province and the essential similarities between proprietary right and occupancy right, I do not see any reason to exclude analogies drawn from incidents relating to the former in inquiries about cognate questions regarding the latter. I am on the contrary disposed to think that the analogies are very valuable and ought to serve as guides to decision in the absence of positive evidence bearing on those questions. As in the case

of ownership of land, the right to contest alienations by the owner in possession is based on the right of succession, a similar principle ought naturally to govern the right to object to transfers of occupancy rights subject of course to the paramount right of the proprietor. As with reference to ownership in land the customary rights of reversioners are founded on the consensus of opinion of the community, a similar opinion may not unreasonably be supposed to exist in regard to the allied right of hereditary cultivation. Take for example the typical cases of occupancy right. Where the cultivators have settled with the founders of the village is it probable that while public opinion was unfavourable to any improper interference by alienation with the rights of agnates to succession to rights of ownership it would not be equally so to a similar interference in the case of occupancy rights in land? Or take the other instance of involuntarily parting with proprietary right. Custom would apply to prevent improper alienation as long as the right of ownership remained vested in the holder. Would it cease to apply as soon as the holder's interest became something less than ownership, though his possession remained? I think the natural presumption would be to the contrary.

I agree with Mr. Justice Walker that if the analogies drawn from the custom regarding alienations of proprietary right are excluded from consideration it would be practically impossible in most cases to get evidence of custom restricting the power of alienation in respect of occupancy rights alone.

Occupancy right in land was recognised by the customary law of this Province before the statute law on the subject was enacted. In so far as the provisions of the Punjab Tenancy Act apply the incidents of the right must be governed by them. But I do not think it follows that the power of controlling improper alienations previously possessed by the agnates of the tenant has necessarily been taken away because it is not mentioned in the Act.

I would accordingly answer the first question referred to us in the negative. In respect of the second* I would apply that Section 59 (2) has no special bearing on it, but that on general principles evidence of custom regarding the power of alienation of proprietary right in agricultural land is relevant in an inquiry regarding the power of alienation of occupancy right where the rights of the landlord are not in question.

GORDON WALKER, J.— I think, it must be taken to have been the primary, if not the sole object of the framers of the Punjab Tenancy Act to define the relations between landlord and tenant.

18th March 1899.

No doubt there are provisions which might seem to go beyond this; but of these it may be said generally that they affect the interests of the landlord to the extent of defining the conditions under which the land reverts to him, or the limitations of the rights of others in his favour. Thus under Section 59 the succession of a widow of a tenant to a life interest is provided for, but at the same time her power of alienation is expressly restricted in the interests of the landlord (59 (3)). Section 59 (2) appears to be an exception to this general proposition, dealing so far as I can see only with the right of tenants *inter se*.

At all events it seems clear to me that in deciding a question of the nature arising here we have, unless Section 59 (2) may be taken as affording assistance, to look for guidance outside the four corners of the Tenancy Act. The landlord is in no way concerned, and the question is really one as to the custom applicable in respect of an interest in land. Interests in land, other than that of the mere tenant-at-will, vary, under the system of tenures existing in the Punjab, from the status of the full proprietor through those of the sub-proprietors and of the various grades of occupancy tenants to the lowest form of occupancy tenure. Occupancy tenants have permanent interests in agricultural land which are capable of being inherited and otherwise transferred in accordance with ordinary law or custom save where the Act interferes for the protection of the landlord's rights. I think it is only *qua* the landlord that the rights of occupancy tenants can, as a matter of distinction from other permanent rights in land, be said to be created by statute.

My view then is that when questions of inheritance and the like arise in respect of the rights of occupancy tenants *inter se*, such questions are not distinguishable *in kind* from those that arise in respect of proprietary rights to which ordinary agricultural custom would be applicable.

It appears to me to be only reasonable that, where a general agricultural custom is found to prevail in respect of land, such a custom would be applicable, unless the contrary could be shown, to the permanent interests in land which occupancy tenants hold.

For these and the other weighty reasons given by my learned colleague, Mr. Justice Chatterji, I agree in the conclusion stated in his judgment with a possible reservation in respect of Section 59 (2) which is, however, immaterial.

18th March 1899.

CLARK, C. J.— I agree with the answers given by Mr. Justice Chatterji to the question referred.

I hold that where a tenant has not complied with the provisions of Sections 53 and 56 by giving notice to the landlord of his intention to alienate, or obtaining his previous consent in writing, the alienee obtains no indefeasible title to the tenancy under the Act.

The alienation is then voidable either at the instance of the landlord by Section 60, or by a collateral under customary law, if the collateral is able to establish the custom.

In considering the custom the Court may take into consideration the custom applicable as regards alienations of proprietary right, and as pointed out by Mr. Justice Chatterji a very strong inference would arise from the existence of the custom in the one case that it existed also in the other.

When the Punjab Tenancy Act was passed in 1887 the law as regards alienations of proprietary right was very different from what it is now since the publication of *Punjab Record*, No. 107 of 1887 and other similar judgments. The right of alienation of proprietary right has been very considerably restricted. It is not improbable that if a Tenancy Act were now under consideration, provisions would be introduced to put the right of collaterals on a similar footing as regards alienations of occupancy right as they are with regard to proprietary right or rather that the sections which now make such an alienation indefeasible as noted above, would not stand exactly as they now stand.

Where the Act therefore does not make such alienations indefeasible, it is permissible to apply the general principles of customary law according to which alienations of proprietary right are restricted.

No. 90.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

BADRI DAS,—(PLAINTIFF),—APPELLANT,

Versus

MUNICIPAL COMMITTEE, DELHI,—(DEFENDANT),—RESPONDENT.

Case No. 528 of 1898.

Punjab Municipal Act, 1891, Sections 91, 92, 94, 95—Refusal of Municipal Committee to sanction re-erection of a projection—Discretion of Committee—Jurisdiction of Civil Court—Compensation.

Sections 92 and 150 of the Punjab Municipal Act, 1891, provide for the disposal of certain matters by a Municipal Committee and the Commissioner, and a Civil Court has no jurisdiction to interfere with the dis-

} APPELLATE SIDE.

charge of their powers and duties by either. But when it is alleged that action has been taken by the Committee *ultra vires* or in bad faith, or which is not covered by the authority of the Act, the Court has the power to enquire into the matter, and if it finds that the action complained of is not covered by the powers given to such Committee under the Punjab Municipal Act, 1891, or any other Act, the Court can grant relief which in certain cases would take the form of an injunction.

In a case where a Municipal Committee refused to permit plaintiff to re-erect a certain construction which he had pulled down and wished to rebuild, except in accordance with the Committee's bye-law, whereupon plaintiff sued in the Civil Court for a decree that the Committee had no right to interfere with his re-building, and that they should not so interfere.

Held, that whether or not plaintiff was entitled to rebuild the construction without the permission of the Committee (a point not before the Court), his right to do so was not indefeasible, but must come to an end as soon as the Committee chose to exercise their powers under Section 91 or Section 95 of the Act, a matter entirely within their discretion and in which they were not liable to be controlled by the Civil Court, or, if so liable at all, only when they exercised their discretion in a capricious, wanton and oppressive manner.

Further appeal from the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 12th November 1897.

Madan Gopal, for appellant.

Muhammad Shah Din and Muhammad Shaffi, for respondents.

The facts of the case sufficiently appear from the judgments of the Court delivered by

11th Feby. 1899.

ROBERTSON, J.—This case is one of no great consequence in itself, but it raises a point of considerable importance. It will therefore be well to have the facts clearly set out before we proceed to pass orders. The plaintiff is the owner of a house in Delhi within municipal limits. Defendants are the Municipal Committee of Delhi. On 17th December 1896 Badri Das, plaintiff, put in a petition to the Municipal Committee asking leave to open four new doors, also, in the Katra Mashru side of the house, to erect a verandah on a *chajja* or projection of stone, 2 feet wide, also to build another projection 3 feet wide with a verandah in the Kucha Bulaka Begam side in another direction, with permission to put in some doors opening inwards. The portion with which we are mainly concerned in this case is the stone projection and superincumbent verandah in Katra Mashru. A plan was ordered to be prepared. The ward member (Jugal Kishore) then reported that the existing projection and verandah which it was desired to break up and rebuild might be

allowed, but that in the lane there was not room as the projection there stood. The Committee on 25th January 1899 decided that the rest of the application might be sanctioned, but that the projection in question with its verandah (B in the map) could not be sanctioned beyond the scale allowed by the bye-laws in excess of which it was, that is to say, that in regard to the projection in question the Committee refused plaintiff permission to rebuild the projection as it stood before. The plaintiff appealed to a full meeting of Committee for leave to rebuild the projection as it stood, but this was refused with President's sanction. The plaintiff then brought the present suit, alleging that there is an old projection and verandah in his house, that he asked permission to rebuild it as before, but was refused. Plaintiff states "that he also wishes to construct another projection, 18 feet above it, which he has a full right to do, the Committee has no power to interfere with any repairs, changes or modifications in the projection, therefore their order is *ultra vires*. Plaintiff seeks an injunction to restrain them from interfering with plaintiff's repairs or alterations (*tamir-o-maram-mat chajja*) and verandah to his projection and superstructure."

The defendants pleaded that plaintiff had only the right to re-erect by permission of the Committee, which gave a clear order in accordance with the law. The mere fact that the projection was old did not give a right to rebuild. The Civil Courts have no jurisdiction, and plaintiff can claim no relief.

The first Court held that the plaintiff was merely rebuilding his old projection, which does not amount to a re-erection within the meaning of Section 94, which requires sanction, and gave a decree for that part of the claim, dismissing it as regards the new projection. The plaintiff's claim as regards the new projection is obviously incorrect, and need not be further discussed. Clearly the Committee had the power to refuse permission in that case. The Divisional Judge, however, found that the whole building had been practically rebuilt, except possibly the wall on which the *chajja* (projection) in dispute stands. Such a rebuilding was a re-erection within the meaning of the Municipal Act, and it was clear that plaintiff never obtained sanction for this; the Committee in sanctioning or refusing to sanction such a re-erection could have interfered with the *chajja*. Consequently their order doing so was within their powers, and plaintiff has no claim to relief. The matter has been made the subject of long and learned arguments on various points. But it appears to us that after all there is not such great difficulty in the case as at first sight appeared.

As regards the contention of the counsel for the respondent urged at the outset, that we have no jurisdiction to hear the case, we may dispose of it at once. Section 92 and Section 150 provide for the disposal of certain matters by the Committee and the Commissioner. We have no power whatever to interfere with the discharge of their powers and duties by either. But when it is alleged that action has been taken by the Committee *ultra vires* or in bad faith, or which is not covered by the authority of the Act, the Court has clearly the power to enquire into the matter, and if it finds that the acts complained of by the Municipal Committee are not acts which are covered by the powers given them under this or any other Act, the Courts can grant relief which in certain cases would take the form of injunction. The mere statement that a certain act is done under a certain clause or section of an Act by the party doing it, cannot be held to be conclusive proof that the act was so done, and falls properly within the scope of the authority quoted. That is a point for the Court to decide in each case which comes before it.

To come to the facts of the case. The application in itself was clearly one simply to renew an old standing projection and superstructure. The other parts of the application do not in this case really affect this point. The house may or may not have been rebuilt, the evidence on the file is not clear on this, but certainly there is no application to this effect, nor was it pleaded, and even the Divisional Judge notes that the wall bearing this projection is intact.

Now, what were the powers of the Committee as to this projection? They could clearly have ordered its demolition under Section 95 on payment of compensation. But the Committee plead that when the owner once proposed to take down the projections and rebuild it, they were then entitled to refuse permission. But it appears to us that Section 91, which seems to have been altogether overlooked, so far clearly lays down the principles to be followed in such a case. That section provides that "should any building, or part of a building, project beyond the regular line of a street or beyond the front of the building, or either side thereof, the Committee may, whenever such *building or part* has been either entirely or in greater part taken down by notice require such building or part when being rebuilt, to be set back to, or towards the said regular line.

Provided that the Committee shall make full compensation to the owner for any damage he may sustain in consequence of his building or any part being set back.

Exactly the same principle applies in the present case. There is a projection on the plaintiff's house. The Committee have the power, under Section 95, to order him to remove it. They do not do so, but when he wishes to rebuild they refuse permission. They were clearly entitled to do so, both under Section 91, which, though it covers much more, would also cover such a projection, and under Section 95. But if he suffers any loss through their order he may be entitled to compensation, but whether he would be so or not is not for us to decide in this case.

We have clearly no power to restrain the Committee in this matter. It does not matter that the Committee did not in the first instance take action of their own motion. They have taken action, they have ordered plaintiff in rebuilding to set back a part of his building which projects beyond the front or side of the building, and they were within their rights in doing so. If the owner suffers damage he has his remedy which is not that sought by him in this case. We have only to decide on the facts before us.

We do not know what may or may not have been done to the building, whether or not anything has been done to bring plaintiff within the purview of Sections 92 and 94. As the case upon which the claim was brought stands the Committee were within their powers in refusing to allow plaintiff to rebuild his *chajja* or projection. If he was entitled to compensation in consequence he can claim it, but he cannot get relief by way of injunction.

It may be urged the Court might issue an injunction to the Committee restraining it from action until compensation has been paid or fixed. To this contention we cannot agree. The payment of compensation in such matters is not a condition precedent. When orders are given under these sections, within the terms of their authority, they must be obeyed; under certain circumstances resulting damage must be compensated for. As far as this case is before us it has not reached this stage.

The Committee have said: "If the projection is taken down it must be rebuilt only under certain restrictions." It would then lie on plaintiff to show if he did take it down and rebuild it that he had a just claim to compensation—a contingency which might never arise as he might elect to have it as it stands.

We are of opinion therefore that the relief sought in this case cannot be granted and we dismiss the appeal accordingly with costs.

13th Feby. 1899.

CHATTERJI, J.—I concur. Assuming, for argument's sake, that the plaintiff has the right to repair or re-construct the *chajja* and verandah (b) without reference to the Municipal Committee, all the Committee have done is to refuse his application for its reconstruction except in accordance with their bye-law.

They have issued no notice as far as we know from the present record calling upon him to demolish the *chajja* or verandah or to put them back. Under the circumstances the plaintiff has not made out any right to an injunction of the sort he has claimed. The plaintiff asked their sanction to rebuild, which they have refused. Plaintiff cannot ask for an injunction unless the Committee are bound to give leave as soon as it is applied for. This plaintiff has failed to prove even if we concede that he has the right of reconstruction without their sanction. The giving of sanction is a matter within the discretion of the Committee, and plaintiff cannot in any case compel them to grant it. The utmost he can do is to rebuild without the sanction on his own responsibility, but this does not involve the further consequence aforesaid.

The plaintiff does not ask for a mandatory injunction directing the Committee to give sanction, and such an injunction would, I think, be beyond the power of any Civil Court in this Province to grant. (Section 45, Specific Relief Act.) He claims a decree that the Committee have no right to interfere with his rebuilding, and that they shall not so interfere, but he has hardly disclosed a sufficient cause of action for getting such relief.

But waiving this objection plaintiff has made out no title to the declaration and injunction he seeks. Supposing he can rebuild the *chajja* and verandah without leave, a point not before us, he has no indefeasible right to do so. His right must come to an end as soon as the Committee choose to exercise their powers under Section 91 or 95 of the Act—a matter entirely within their discretion, and in which they are not liable to be controlled by the Civil Court, No. 24, *Punjab Record*, 1890, Civil, or, if so liable at all, only where they exercise their discretion in a capricious, wanton and oppressive manner, *Nagar Valab Narsi v. The Municipality of Dhandhuka*, I. L. R., XII Bom., 490. Such a declaration and injunction would therefore involve an interference with the statutory powers of the Committee and clearly cannot be granted. Moreover, at all events in view of all the above facts it would hardly be right to use the Court's discretionary power to grant an injunction in a case like the present.

No. 91.

*Before Mr. Justice Chatterji and Mr. Justice Robertson.*ASA SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,*Versus*INDAR SINGH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 386 of 1896.

Civil Procedure Code, 1882, Sections 19, 43, 45—Suit for possession of immoveable property situate in different districts—Joint suit by reversioners against person in wrongful possession—Misjoinder of causes of action—"Cause of action," meaning of.

Held, that under Section 19 of the Civil Procedure Code, when immoveable properties are situate in several districts, a suit in respect of the whole of the properties can be brought in any one of these districts. *I. L. R., XIV Calc., 661, followed.*

Where on the death of the survivor of two widows, all the reversioners, fourteen in number, brought a joint suit for possession of property which was alleged to be wrongfully withheld from them by the defendant, and which was admittedly undivided,

Held, that though the rights of the plaintiffs might be divisible and have accrued to them undivided on the death of the said widow, the substance to which those rights attached being undivided, plaintiffs' title and property was still joint, and that they were therefore entitled to jointly sue defendant whose wrongful holding of possession of the property was the single act which infringed those rights.

Held, further, that even if the words "cause of action" were construed in the limited sense of including merely the facts constituting the infringement of the right, but not those constituting the right itself, the plaintiffs were nevertheless entitled to sue jointly, as it was the same wrongful act of the defendant which infringed these rights, whether joint or distinct, in the property in dispute.

It appeared that during the life-time of the widows the reversioners had brought several suits for declaratory decrees in respect of various alienations effected by the said widows in favour of the present defendant from time to time, but that they had not sued for certain houses which were now included in their claim.

Held, that inasmuch as the reversioners' right to possession of the houses could not accrue during the life-time of the widows, their suit for possession thereof, on the death of the survivor of the widows, was not barred under Section 43 of the Civil Procedure Code.

*First appeal from the order of Rai Bahadur Buta Mal,
District Judge, Lahore, dated 23rd December 1895.*

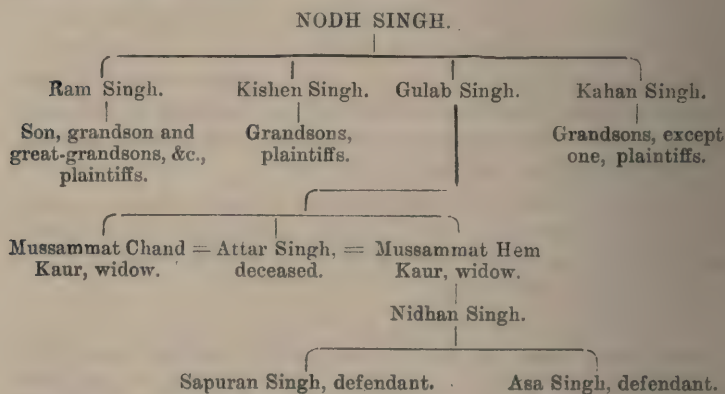
K. P. Roy and Lal Chand, for appellants.

Madan Gopal and Jaishi Ram, for respondents.

The facts of the case fully appear from the judgment of the Court delivered by—

29th Jan'y, 1899.

CHATTERJI, J.—One Attar Singh, Jat, died before the summary settlement of the Lahore District, leaving certain property in that district, *Mauza* Ghawind, and in Dadpur Garoha in the Hoshiarpur District, where he appears to have mainly resided. He was childless at the time of his death, but left two widows, Mussammats Chand Kaur and Hem Kaur. The relationship of the present parties to Attar Singh is shown by the short pedigree table given below.



About two-and-a-half years after Attar Singh's death Mussammat Hem Kaur gave birth to a son, Nidhan Singh, who was accordingly regarded as illegitimate. The widows, however, and the mother of Attar Singh, Mussammat Rup Kaur, who was alive at his death, practically treated him like a son of Attar Singh. Mussammat Hem Kaur's share was entered in his name, while Mussammats Chand Kaur and Rup Kaur each got a third share of Attar Singh's land in the Hoshiarpur District recorded in their names. The earliest record in Ghawind was in 1856, and there Nidhan Singh, then a minor, and Mussammat Chand Kaur were entered as owning equal shares, and Azmat, Rajput, as their *sarbarah*. Nidhan Singh died before the widows of Attar Singh, aged about thirty-two, and his sons Sapuran Singh and Asa Singh were recorded in his place.

The illegitimacy of Nidhan Singh led to much litigation between him and the plaintiffs, or some of them. The following are the most material :—

In the Lahore District—

- (1). He sued Jowakir Singh, father of plaintiffs Nos. 1 and 2, and one Bhag Singh in 1855 for possession

of a house. His legitimacy was denied, and put in issue, and found against him, but a decree was passed in favour of Mussammat Rup Kaur, who was also impleaded as a plaintiff. Nidhan Singh's claim was dismissed.

- (2). While the revised regular settlement was in progress, some of the plaintiffs, Jowahir Singh and others, sued Mussammat Rup Kaur and Nidhan Singh for a declaration of right, or possession of five shares out of twelve, in Dheri Singha, in Ghawinda, four of which Mussammat Rup Kaur had purchased from one Dial Singh, and the fifth belonged to her son, Attar Singh, the plaintiffs contending that Nidhan Singh was illegitimate and no heir, and that Mussammat Rup Kaur was incompetent to make a gift of the five shares to him as she professed to do. It was found, in accordance with the previous decision, that Nidhan Singh was illegitimate, and that Mussammat Rup Kaur could not give him Attar Singh's original share, but could gift the four purchased shares to him. A decree was passed to this effect, and the entry of Nidhan Singh's name as to the one share was ordered to be expunged and Mussammat Rup Kaur's name substituted again, and the claim as to the four shares was dismissed. The entries, however, appear to have continued as before, and Nidhan Singh was shown owner of $2\frac{1}{2}$, and Mussammat Chand Kaur of $2\frac{1}{2}$ shares.

- (3). In 1883 Mussammat Chand Kaur made a gift of her half to Nidhan Singh's sons, the present defendants, and in 1887 plaintiffs sued to have it set aside, and got a decree in the Court of the District Judge of Lahore on 26th January 1888.

In the Hoshiarpur District there were several suits, of which the following alone need be mentioned :—

- (1). On Mussammat Rup Kaur's death Nihal Singh and others, plaintiffs, sued for a declaratory decree that they were the reversioners, and that the entry of one-half of Mussammat Rup Kaur's land in the name of Nidhan Singh should be expunged and Mussammat Hem Kaur's name

substituted. Plaintiffs got a decree, which was upheld by Colonel Gordon Young, Commissioner, Jullundur Division, and by which their reversionary right was declared on 22nd May 1876.

- (2). In 1877 some of the plaintiffs sued to expunge the name of Nidhan Singh from the original entry in respect of one-third of the land. This was decreed by the First Court, but on appeal their suit was dismissed by Mr. Brandreth, Commissioner, on 14th April 1878, on the ground that Nidhan Singh had been in adverse possession for more than twelve years.
- (3). In 1883 Mussammat Chand Kaur gifted the share of the Hoshiarpur property entered in her name, viz., 21 *bighas* 13 *biswas* in favour of the present defendants, sons of Nidhan Singh, and it was held that Nidhan Singh was illegitimate, and that the gift was illegal. It was accordingly set aside.

In the suit finally decided in favour of Nidhan Singh by Mr. Brandreth, only the descendants of Ram Singh and Kishen Singh, brothers of Gulab Singh, were concerned. The heirs of Kahan Singh were no parties, and are not bound by the result of that litigation.

On 19th January 1886 the descendants of Ram Singh sold their remaining interests in the Hoshiarpur property, viz., one-third of two-thirds, the remaining third having been adjudged to be Nidhan Singh's property as against them, or 7 *ghumaos* 2 *kanals* 2 *marlas* to the defendants by a registered deed for Rs. 900. Similarly on 17th December 1894 the heirs of Kishen Singh transferred their rights to the defendants for Rs. 900. The result of these transactions, with the decree of Mr. Brandreth, was that the descendants of Ram Singh and Kishen Singh lost all their interest in the Hoshiarpur property, and defendants became owners of four-ninths by purchase and one-third by Mr. Brandreth's decree. The heirs of Kahan Singh remained owners of two-ninths held by the widows, and had a claim which they have not yet attempted to enforce against the third share adjudged to Nidhan Singh by Mr. Brandreth.

Both the sales were of rights of expectancy, as Mussammat Hem Kaur and Chand Kaur were both alive when the first sale took place, and Mussammat Hem Kaur when the second was effected.

Mussammat Hem Kaur having died, the plaintiffs, heirs of all the three brothers of Gulab Singh, have brought this suit for possession of—

- (1) the whole of the Lahore property ;
- (2) two-ninths share of the Hoshiarpur property.

The last belongs exclusively to the descendants of Kahan Singh. In their amended plaint, dated 13th December 1894, the plaintiffs point out that the third share of Hoshiarpur property by which they mean that decreed to Nidhan Singh is not in dispute in this suit.

The pleas are voluminous, and are set out in the judgment of the lower Court as well as in the printed record, pages 3 and 4, and need not be recapitulated here. The issues are also numerous, and appear in pages 7 and 8 of the printed record.

The District Judge of Lahore, who tried the case as the Court of first instance, found in favour of the plaintiffs on all the issues framed, and decreed the claim. The defendants appeal on substantially the same grounds as were raised before him.

The ninth ground of appeal may at once be disposed of. It appears to be based on a misapprehension. As shown above, the third share originally entered in Nidhan Singh's name is not now claimed, and the heirs of Kahan Singh only claim one-third of the residue after deducting the shares sold by the plaintiffs of the other two branches. After going through the papers with us appellants' counsel admitted his mistake. The decree of the lower Court is only for a two-ninth share of the Hoshiarpur property, and is perfectly correct.

The other points which call for decision in this appeal are :—

1. Whether the lower Court had jurisdiction to hear the suit.
2. Whether the claim was bad on the ground of misjoinder of causes of action.
3. Whether the claim is barred by limitation.
4. Whether the claim for house property is barred by Section 43, Civil Procedure Code.
5. Whether the defendants are entitled to any, and, if so, what compensation for improvements of the property in suit.

These were argued at great length, though they do not appear to present any difficulties on the facts of this case.

As regards the first point counsel quoted many authorities which he admitted were not directly in point, but merely contained expressions of opinion in favour of his contention. He also admitted that there are other cases containing opinions to the contrary which are entitled to equal weight. In *Maseyk v. Steel & Co., I. L. R., XIV Calc., 661*, it is conceded in the judgment that under Section 19 of the Code of Civil Procedure where immoveable properties are situate in several districts a suit in respect of the whole of the properties can be brought in any one of the districts, and this appears also to be conceded in *Gopi Mohan Roy v. Doybaki Munden Sen, I. L. R., XIX Calc., 13*, though both cases properly relate to execution after decree. The contrary expression of opinion in *Shurup Chundar v. Aminunnissa, I. L. R., VIII Calc., 703*, which was also an execution case, does not seem to be entitled to much weight. All these rulings relate to Section 223, Civil Procedure Code, and its scope. *Khatifa v. Ismail, I. L. R., XLI Mad., 380*, and No. 10, *Punjab Record*, 1891, support the view that the District Judge below had jurisdiction to hear the suit in respect of property situate in the Hoshiarpur District. In our opinion the last clause of Section 19, Civil Procedure Code, seems to make this perfectly clear, and it was only by insisting that the word "property" is used strictly in the singular that counsel was able to make a show of argument that it did not justify the lower Court's procedure. The word "property" has been used in a comprehensive sense, and is clearly intended to include cases in which several items of property are involved. In the Calcutta case reported in *I. L. R., Vol. XIV*, the Chief Justice uses the plural "properties" in dealing with the section, and there can be no doubt that he is right. The practice of the Court accords with the plain grammatical meaning of the term, and we have therefore no hesitation in holding that the lower Court had jurisdiction to entertain the suit.

Somewhat similar remarks may be applied in respect of the second contention. It was admitted that the constant and daily practice of the Courts was against it, and when questions of this kind arise, unless the words of the law are quite clear, the practice has to be shown to be wrong. A great number of authorities were quoted by counsel, but the utmost that could be said of their applicability was that by analogy they supported the conclusion that the suit was bad for misjoinder of causes of action. There are fourteen plaintiffs, and it is argued that there should have been fourteen suits against the defendants, i.e., one suit by each plaintiff for

his share of the property. The existing practice is certainly convenient, and we have little hesitation in holding that it is not proved to be wrong. The expression "cause of action" has not been defined in the Code, but we have no doubt that the meaning given to it in *Cooke v. Gill*, L. R., 8 C. P., 107, and *Read v. Brown*, L. R., 22 Q. B. D., 128, viz., that it includes every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court, is the one the Legislature has had in view in framing most if not all the sections of the Code relating to it. See *Murti v. Bhola Ram*, §c., I. L. R., XVI All., 165, F. B., *Salima Bibi v. Sheikh Muhammad*, I. L. R., XVIII All., 131, and *Rajjo Kaur and another v. Debi Dial and others*, *ibid.*, 432. This necessarily involves the inclusion of the entire set of facts which constitute the plaintiffs' right and its infringement. The defendants have refused to recognise the plaintiffs' rights, and withheld from them the property to which they are entitled. The rights of the plaintiffs may be divisible, and may have accrued to them individually on the death of the widows, but the substance to which those rights attach is undivided. Both their title and their property therefore is still joint, and defendants holding possession of the latter is the single act which infringes their rights, and drives them to seek relief in Court. Counsel for the appellants admits that if several owners of joint property are dispossessed by the single act of a trespasser they may bring a joint suit for the recovery of the property. The defendants' possession in this instance is *ex hypothesi* that of trespassers, and the property being undivided we are unable to see why a joint suit should not lie.

In practice suits by Hindu or Muhammadan heirs are generally brought jointly, and the balance of convenience is greatly in favour of this course. Such an objection is seldom, if ever, raised, and hence there are not many authorities in which the point has been directly ruled. Yet authority is not wanting, though it is hardly required. See *Ram Sewak Singh v. Nakched Singh*, I. L. R., IV All., 261; *Salima Bibi v. Sheikh Muhammad*, I. L. R., XVIII All., 131, at page 139.

Even if "cause of action" is taken in a limited sense so as to include only the facts constituting the infringement of the right, but not necessarily those constituting the right itself, as was held with reference to Section 26 of the Code in *Haramoni Dassi*, §c., v. *Hari Charn Chowdhry*, I. L. R., XXII Cal., 833, the plaintiffs are clearly entitled to bring a joint suit as the same wrongful act of the defendants infringes their rights in

the property in dispute whether those rights are joint or distinct. This case is another authority in support of the procedure which plaintiffs have adopted.

In our opinion therefore the second contention is wholly untenable.

The fourth point dealing as it does with the cause of action of the plaintiffs may also be conveniently decided before the other questions are taken up. The objection under Section 43, Civil Procedure Code, related to house property inasmuch as it was not sued for when the previous litigation against Nidhan Singh took place. It is clear, however, that the previous suits were for declaratory decrees, and it was clearly ruled in the Lahore case in 1869 that plaintiffs were not entitled to possession. Their right to possession in fact could not have accrued in the life-time of the widows who were entitled to hold for life. Taking the definition of "cause of action" in *Cooke v. Gill*, it is obvious that the plaintiffs' cause of action in this suit is quite different, and the same result would follow if the expression is taken in the limited sense it is held to be used in Section 26, Civil Procedure Code. The Full Bench case quoted from the 4th volume of the Allahabad series is also in favour of this view, which can be supported by numerous authorities if required. This point must also be decided against the appellants.

As regards the plea of limitation numerous decisions have been quoted to show that a trespasser holding adversely to the widow in possession for more than twelve years bars also the rights of the reversioners, and it is contended that Nidhan Singh held adversely to the widows, particularly after the failure of the plaintiffs to carry out execution of the decree granted in their favour by the Lahore Court in 1869. We have no hesitation in holding that none of these cases apply. It is absolutely clear on the facts that the widows, including Mussammat Rup Kaur, strongly favoured Nidhan Singh, and wished to give him the status of a legitimate son of Attar Singh. He was born after Attar Singh. How did he get entry in respect of Mussammat Hem Kaur's share unless with her consent. Mussammat Rup Kaur's action in 1856 and 1868 shows that she did her best to put Nidhan Singh in possession, and so do the gifts in favour of the defendants by Mussammat Chand Kaur. The case is if possible stronger in favour of the reversioners than No. 74, *Punjab Record*, 1895. It was repeatedly held by the Courts, both at Hoshiarpur and Lahore, that Nidhan Singh or his sons had not, nor could have adverse possession against the

widows, and this view is correct even if it is not conclusive against the defendants. The solitary finding of Mr. Brandreth in respect of the third share of the Hoshiarpur property, which is not in dispute in this suit, has no bearing on the case. We find therefore that the claim is not barred by time.

As regards compensation there is no proof worth the name that any substantial improvements were really made by Nidhan Singh or the defendants from his or their private funds. He is not shown to have possessed any sufficient funds of his own which would have been applied for this purpose, while throughout life he lived on friendly terms with the widows who were the owners of the property for life, and had pensions of considerable amounts from Government. The defendants have made out no claim for compensation on the score of improvements, nor can they be held to have acted *bonâ fide* under the circumstances if they have made any. The finding of the lower Court must be upheld on this point also.

The appeal is dismissed with costs.

Appeal dismissed.

No. 92.

Before Mr. Justice Reid and Mr. Justice Anderson.

MR. G. O'GORMAN,—(PLAINTIFF),—PETITIONER.

Versus

MAHTAB SINGH,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Case No. 746 of 1898.

Document, construction of—Promissory note or acknowledgment of liability—Suit based on document stamped with anna stamp—Admissibility of document in evidence—Right of plaintiff to fall back on original consideration—Evidence Act, 1872, Section 91—Stamp Act, 1879, Section 34.

Plaintiff in his plaint alleged that "on the 17th June 1897 defendant raised Rs. 500, cash, at Lahore and wrote the promissory note. He agreed to repay the money by monthly instalments of Rs. 100, and further agreed to pay Re. 1 per cent. per mensem as interest," that demand for payment had been made, and that the cause of action arose on the expiry of the period for the payment of each instalment, the suit being filed on the 14th October 1897 for three instalments and interest as above stated. The document referred to had affixed to it an anna stamp, and was in the following terms:—"Received from Mr. E. G., Superintendent, Punjab Dairy, the sum of Rs. 500 only, as advance, repayable by instalments of one hundred per month, and to bear interest at Rs. 12 per cent.—17th June 1897." It was signed by the defendant.

The first Court dismissed the suit on the ground that the document upon which it was based was a promissory note, payable otherwise than on demand, and, being insufficiently stamped as such, could not, under Section 34 of the Stamp Act, 1879, be admitted in evidence for any purpose,

even on payment of a penalty, in a civil suit. Plaintiff applied for revision of this order, and it was contended on his behalf that the document bore a dual character, as a promissory note and as an admission of liability, and was admissible in evidence as an acknowledgment. It was further contended that the Rs. 500 were made up of advances for milk made at various times, and that plaintiff was in any event entitled to fall back upon the original consideration of the contract.

Held, that the document upon which plaintiff based his suit was a promissory note, payable otherwise than on demand, and, being insufficiently stamped as such, could not, under Section 34 of the Stamp Act, be received in evidence or acted upon in a civil suit.

Held, further, that plaintiff was not entitled to aver against his plaint or to amend his plaint in such a manner as to sue on the original consideration.

Held, also, that from the frame of the suit it was clear that the document sued on embodied the contract between plaintiff and defendant, and was the contract out of which defendant's liability arose, and that under Section 91 of the Evidence Act, the document was the best evidence of the contract, and no other evidence of the terms thereof could be given.

Petition for revision of the order of Lala Narain Das, Judge, Small Cause Court, Lahore, dated 14th January 1898.

Herbert, for petitioner.

Ishwar Das, for respondent.

The judgment of the Court was delivered by

27th Feby. 1899.

REID, J.—The plaintiff filed a suit on the following document:—

“Received from Mr. E. Goodwin, Superintendent, Punjab Dairy, the sum of rupees five hundred (Rs. 500) only as advance, repayable by instalments of one hundred per month, and to bear interest at Rs. 12 per cent. 17th June 1897;” signed by the defendant, and bearing a one-anna adhesive stamp. The claim was for Rs. 315, three instalments and interest.

The Court below dismissed the suit, holding the document to be a promissory note, payable otherwise than on demand. As such the stamp was insufficient, and the document could not, under Section 34 of the Stamp Act (I of 1879), be admitted in evidence for any purpose, even on payment of a penalty, in a civil suit. For the plaintiff-petitioner it is contended that the document bears a dual character, as a promissory note and as an admission of liability, and that it is admissible in evidence as an acknowledgment.

Reliance is placed for either side on (1) *Kanhaya Lal v. Stowell*, I. L. R., III All., 581; (2) 42 *Punjab Record*, 1895; (3) *Balbhadar Parsad v. Maharaja of Betia*, I. L. R., IX All., 351;

(4) *Hira Lal v. Data Din*, I. L. R., IV All., 135; (5) *Golab Chand Marwares v. Thakurani Mohokoom Kooaree*, I. L. R., III Calc., 314; and (6) *Fateh Chand Har Chand v. Kisan*, I. L. R., XVIII Bom., 614.

In the first case quoted the suit was based on account books, and it was alleged that the defendant had given the following document to the plaintiff "Agra, 14th November 1877. Due to Kanhaya Lal, cloth merchant, the sum of Rs. 200 only, to be paid next January 1878," which was relied on as an acknowledgment. A majority of a Full Bench of the Allahabad Court held that the document though not admissible in evidence as a promissory note in proof of a promise to pay, by reason of being stamped only with a one-anna stamp, was, nevertheless, admissible as a memorandum in proof of an acknowledgment of a debt. The question referred to the Court was simply whether the document was admissible in evidence. The suit was not based on the instrument.

In the second case quoted the suit was based on a document which was held to be a promissory note, insufficiently stamped. It was further held that the document could not be admitted or acted upon, and that the plaintiff's case disclosed no cause of action upon which the suit could proceed after the document had been rejected and put out of consideration. The judgment proceeded "Where there is no previous transaction of loan, and "the promissory note is given in return for a loan of money or "in payment of moveables purchased, the sole question appears "to be, does the promissory note represent the terms of the "contract reduced to writing, or was there some other contract "which the plaintiff can fall back upon, alleging that the promissory note was given merely as a collateral security for "the payment of the debt? To apply the language "of Garth, C. J., in the leading case on the subject, *Sheikh Akbar v. Sheikh Khan*, I. L. R., VII Calc., 260, the deposit "was made upon the terms contained in the note, and no other. "In such a case the note is the only contract between the "parties, and if, for want of a proper stamp, the note is not "admissible in evidence the creditor must lose his money." In the third case quoted it was held that the unstamped note tendered in evidence did not embody the contract between the plaintiff and the defendant, and could not therefore be considered as the contract, out of which the defendant's liability arose, and it was consequently held that it was open to the plaintiff to prove the verbal contract, i.e. to prove what the consideration for the note was, in the same way as if he had

lent money or delivered goods to the defendant. In the fourth case quoted it was held that the existence of an insufficiently stamped promissory note for the balance of a sum due on a pledge of moveable property, the note having been executed as consideration for the return of the property by the creditor did not bar a suit for the balance. In the fifth case quoted it was held that the existence of an unstamped promissory note did not prevent the lender of money from recovering on the original consideration, if the pleadings were properly framed for that purpose, and that the great power given by the Code of Civil Procedure of raising the true issues between the parties prevented the question of pleading having much importance. A distinction was drawn between cases in which the plaintiff did and did not seek to give independent evidence of the consideration, and it was apparently conceded that where a plaintiff sued on an unstamped promissory note alone, without giving any independent evidence of consideration, he must fail.

In the sixth case quoted a suit was filed for money due for goods purchased from time to time by the defendant, for which he had struck a balance in his own writing: this balance was unstamped, and therefore incapable of being acted upon as an acknowledgment of a particular sum being due, but it was held that the suit differed from one brought on an insufficiently stamped *hundi*, and that the balance struck might be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold. *Chenbasapa v. Lakshman Ram Ohandla*, I. L. R., XVIII Bom., 369, in which it was held that a *hundi* was acted upon where a decree was passed on it, whether its execution was admitted or proved, and that owing to the language of the Stamp Act a Court could not give effect to an insufficiently stamped *hundi* in either case, was distinguished.

In *Radhakant Shah v. Abhoy Churn Mittar*, I. L. R., VIII Calc., 721, Garth, C. J., referred to VII Calc., 260 (*supra*), saying—
“Of course, if the consideration for the bill had been an independent cause of action, complete in itself before the bill was given, the appellant's argument would have been well founded.
“But here it is stated in the plaint, and it is evidently the fact, that the Rs. 500 which was the consideration of the bill, was advanced by the plaintiffs to the defendants upon this particular bill, and as the bill itself is the best evidence of the terms upon which the advance was made, the plaintiffs could not establish their case without proving the bill.”

In *Valiappa v. Muhammad Khasim, I. L. R., V Mad., 166*, it was held, where the plaintiff brought a suit against the defendant, the drawer of a *hundi*, to recover a balance due thereon, that the suit was brought on the *hundi*, and not to recover the consideration, and that the plaintiff could recover only on the *hundi* which was insufficiently stamped and on production was obviously incapable of being acted on, the result being that the suit necessarily failed.

The first paragraph of the plaint in the present suit runs as follows:—"On the 17th June 1897 the defendant raised Rs. 500 cash at Lahore, and wrote the promissory note. He agreed to repay the money by monthly instalments of Rs. 100, and further agreed to pay Re. 1 per cent. per mensem as interest." The second paragraph alleged demand, and stated that the cause of action arose on the expiry of the period for the payment of each instalment, and the suit was filed, on the 14th October 1897, for three instalments and interest as above stated. At the hearing it was stated by the plaintiff-petitioner's pleader that the sum of Rs. 500 was made up of advances for milk made at various times. We do not think that he can be allowed to aver against his plaint, or to amend his plaint in such a manner as to sue on the original consideration.

The document sued on embodied the contract between the plaintiff and the defendant, and is the contract out of which the defendant's liability arose. This is clear from the frame of the suit, the claim being for the instalments due at the date of the suit, and not for the whole sum due at the date of the execution of the document.

Whatever may have been the original consideration, the contract for payment by monthly instalments was effected by the document which is the best evidence of the contract, and, under Section 91 of the Evidence Act, no other evidence of the terms of the contract can be given. Section 34 of the Stamp Act is a bar to the document, which is an insufficiently stamped promissory note, being received in evidence or acted upon, and the Court below rightly dismissed the suit based on it.

The application for revision is dismissed with costs.

Application dismissed.

No. 93.

Before Mr. Justice Gordon Walker and Mr. Justice Anderson.

SADHU,—(DEFENDANT),—APPELLANT,

Versus

MISRI,—(PLAINTIFF),—RESPONDENT.

Case No. 1127 of 1896.

Custom—Succession—Abandonment of worldly affairs—Gossains.

A broad distinction is to be drawn as regards the powers of inheriting property between *faqirs* or members of a religious order who have, and those who have not, entirely renounced the world, the latter class not being disqualified from succession in their natural families.

In a case where it appeared that the plaintiff though he left his village and joined a religious order (*Gossains*), had not renounced the world but, on the contrary, was the father of three children who appeared to be grown up, *held*, that plaintiff had never reached the stage of complete asceticism which would disqualify him from inheritance, and that he was entitled to succeed to the estate of his nephew in preference to the defendant, who, if a relation at all, was a distant one.

Further appeal from the order of S. Cliford, Esquire, Divisional Judge, Delhi Division, dated 30th June 1896.

Rozdon, for appellant.

Madan Gopal, for respondent.

The judgment of the Court was delivered by

22nd Feby. 1899.

GORDON WALKER, J.—As regards the question of the identity of plaintiff with Misri, the uncle of Wazira, there seems to us to be no room for doubt, and we accept the concurrent finding of the lower Courts on this point. The evidence of this is complete.

Next as regards the question of custom it is pointed out to us that no question of abandonment by Misri, plaintiff, arises. He was joint owner with his nephew, Wazira; and even taking it that he lost his rights as a co-sharer with Wazira, the question now is whether he is entitled to succeed as heir of Wazira. It is clear that he is, unless he is incapable of inheritance or disqualified.

“By abandoning worldly affairs and entering a strictly “religious or ascetic order a person becomes civilly dead, and “forfeits his right of inheritance” (*Rattigan’s Digest*, para. 30). This expression of the general custom in the matter is supported by many other authorities, and it is clear that a person who enters a religious order may stop short of asceticism and the entire abandonment of worldly affairs which would disqualify him from inheriting property. If he does so stop short, there

is apparently no loss of the right to succeed to property. On this point see Mayne's *Hindu Law and Usage* (4th Edition), paras. 546 and 559. In the latter it is noted that the "mere fact that a person calls himself a *Bairagi*, or religious mendicant, or indeed that he is such, does not of itself disentitle him to succeed to property." Reference may also be made to the decisions of this Court in *Punjab Record*, Nos. 1 of 1868, 15 of 1874, 24 of 1880, and 29 of 1881, which fully support this view. Other authorities on the subject are *I. W. R.*, 309, *X W. R.*, 172, *XV W. R.*, 197. Also see Census Reports, Ibbetson, p. 386, MacLagan, p. 112—3, 124—5, the last with special reference to what is meant by the term *Gossain*.

It is clear, therefore, that a broad distinction is to be drawn, as regards the power of inheriting property, between *faqirs* or members of a religious order who have, and those who have not, entirely renounced the world, and that the latter class are not disqualified from succession in their natural families. In the present inquiry ten instances have been quoted in which *Gossains* (the order to which plaintiff belonged) have succeeded to property in the usual way. The learned Divisional Judge appears to be in error in stating that only four such instances have been cited.

We think that the above is the correct view of the custom rather than that taken by the Divisional Judge, *viz.*, that "a *faqir* on marriage ceases to belong to the *dera* as unfit for the "brotherhood." No doubt there is evidence (see that of *Sujanpuri*) to the effect that plaintiff was turned out of the order because he was not an ascetic. But the question rather is whether there was on the part of plaintiff any such complete renunciation of the world as would involve his becoming civilly dead. It seems clear to us that there was not; but that the plaintiff, though he left his village and joined a religious order, did not renounce the world. On the contrary, he is the father of three children who appear to be grown up. He never reached the stage of complete asceticism (sometimes apparently called *abdhut*) which would disqualify him from inheritance, and he is entitled to succeed to the estate of his nephew, *Wazira*, in preference to the defendant, *Sadhu*, who, if a relation at all, is a distant one.

As regards the debts owed by the deceased and his funeral expenses there has been a very full inquiry, and the findings of the lower Courts on these points should be accepted. They were fully gone into in the further inquiry ordered by the Divisional Judge.

The fifth ground of appeal is put forward under a misapprehension and is withdrawn.

We think that the appeal of the defendant, Sadhu, must fail, and it is dismissed with costs.

Appeal dismissed.

No. 94.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

KARTAR SINGH AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

MATHAR SINGH,—(PLAINTIFF),—RESPONDENT.

Case No. 298 of 1896.

APPELLATE SIDE. }

Adoption of brother-in-law's son—Hindu Law or custom—Sikh Khatri of Rawalpindi—Burden of proof—"Agricultural tribe."

One K. S., a Sikh Khatri, of the Bindra section, having adopted G. S., his wife's brother's son, plaintiff sued for a declaration that the adoption was invalid by custom and would not affect his reversionary rights. It appeared that the families of plaintiff and K. S. had held land for at least two generations, and that the total ancestral land in the possession of K. S. was about 4 *ghumaos* 5 *kanals*. The lower Courts decreed plaintiff's claim on the ground that defendants had failed to prove that the said adoption was valid by custom.

Held, that though the primary rule of decision in a suit of the present character is custom, there is no necessary legal presumption that a particular custom bearing on the point in issue exists, Section 5 of the Punjab Laws Act, 1872, only casting on the Court the duty of enquiring whether there is any such custom binding on the parties, and, if there is, to decide the suit in accordance therewith.

Held, further, that under Hindu Law, which was the personal law of the parties, the adoption in question was perfectly valid.

Held, therefore, that plaintiff who was suing to set aside an adoption, which was valid by the personal law of the parties, on the ground that it was invalid by custom, must fail if the custom upon which he relied was not proved, and that he was accordingly bound by the rules of pleading to establish that custom affirmatively.

Held, further, that inasmuch as Khatri do not ordinarily form an agricultural but a trading community, the usages of agriculturists cannot be presumed to apply to them, and therefore that plaintiff could not claim the benefit of the presumption laid down by the Full Bench in No. 50, *Punjab Record*, 1893, so as to shift the burden of proof from himself to defendants.

Found, upon the evidence, that plaintiff had failed to prove that by custom among the parties the adoption of a wife's brother's son was invalid.

Further appeal from the order of J. G. M. Rennie, Esquire, Divisional Judge, Rawalpindi Division, dated 24th January 1896.

Ishar Das, for appellants.

Beechey, for respondent.

The judgment of the Court was delivered by

CHATTERJI, J.—The plaintiff and defendant, appellant 1, 10th Jany. 1899. Kartar Singh, are Sikh Khattris of the Bindra section of Sukhu in the Rawalpindi District. Plaintiff is Kartar Singh's brother and has sued for a declaration that the adoption of Gulab Singh, appellant 2, by Kartar Singh, is invalid by custom and would not affect his reversionary rights. Appellant 2 belongs to the Abhera section of Khattris and is the son of Kartar Singh's wife's brother. The plaint recites that the adoption was made by means of a deed registered on 6th January 1890, that mutation of names has taken place in Gulab Singh's name in respect of land belonging to Kartar Singh without however transfer of possession, and that the land as well as all immoveable property held by Kartar Singh is ancestral.

The defendants pleaded that the adoption took place long before the deed and that the claim was barred by time. They further urged that the adoption was valid and had been acquiesced in by the plaintiff.

Issues were drawn covering all the points in dispute on the pleadings.

The first Court held the claim to be within time, the adoption to be invalid by custom and decreed the claim. The Divisional Judge on appeal upheld these findings and the decree of the lower Court. The defendants appeal, again urging the contentions put forward in the Courts below.

Before taking up the merits of the appeal we may mention that appellants' counsel applied at the hearing to have a compromise, alleged to have been arrived at between his clients and the plaintiff's authorised agent recorded by us and the appeal disposed of in accordance therewith. After hearing the parties and their counsel we rejected this application as we were of opinion that the parties had not come to any definite agreement.

As regards the point of limitation we are not prepared after going through the evidence to differ from the finding of the lower Courts. That Gulab Singh lived with Kartar Singh long before 1890 and was married by him is well established and indeed is not disputed. It is also probable that he was to all intents and purposes treated as a son, but we are unable to

hold in the face of the concurrent opinions of the learned Judges below that a regular and complete adoption took place prior to the execution of the deed. The circumstantial evidence is conflicting and inconclusive. The entries in the Hindi School register, if perfectly reliable, which is doubtful, only show that Kartar Singh called Gulab Singh his son at the time, but this does not necessarily mean a completed adoption and is consistent with a contemplated one. There was relationship by marriage between the two and Gulab Singh whose mother was dead was no doubt very dear to Kartar Singh's wife and therefore treatment as a son is not conclusive. The performance of the marriage of Gulab Singh by Kartar Singh is explainable in the same way as well as the *tambol* given by plaintiff assuming it is proved. The deed of 21st September 1882, executed by Gulab Singh and Kartar Singh together appears to indicate that an actual adoption had not taken place at the date of that document, while the wording of the promise made by Kartar Singh in favour of the plaintiff in the deed of 14th January 1882 is somewhat dubious. The language probably more readily admits of the interpretation put on it by the defendants; still it is very curt and the word *mutlanna* may have been used to denote a person meant to be but not actually adopted. The oral evidence has been disbelieved by two Courts, and in the absence of some tangible fact which puts the adoption beyond doubt we are not disposed to take a different view. On the whole therefore we find that the adoption prior to 1890 is not satisfactorily proved, and that in any case plaintiff's knowledge of the fact is not made out. We therefore hold that the claim is not barred by time.

The next question is whether the adoption of Gulab Singh is invalid by custom. This is the form in which issue should be drawn and in our opinion the lower Courts were wrong in throwing the *onus* of proof of the validity of the adoption on the defendants. The primary rule of decision in a matter of this kind is undoubtedly custom, but, as pointed out in No. 149, *Punjab Record*, 1888, and No. 60, *Punjab Record*, 1895, there is no necessary legal presumption that a particular custom bearing on the point in issue exists. Section 5, clause (a) of the Punjab Laws Act, only casts on the Court the duty of enquiring whether there is any such custom binding on the parties and if there is to decide in accordance with it. The plaintiff who is suing to set aside the adoption and who would fail if the custom he relies on invalidating the adoption is not proved is by the rules of pleading bound to establish that custom. It is true that among certain tribes, mostly land-holding

agriculturists, definite customs regarding adoption have been ascertained by inquiry and declared to exist by previous judgments of this Court. In cases covered by these decisions or where a definite rule on the subject of *onus* has been laid down by a Full Bench, the plaintiff would be relieved of the burden of proof which in the first instance lay on him and which would then be shifted to the defendants. The plaintiff contends that people of his tribe are agriculturists and that the adoption of Gulab Singh being that of a non-agnate is to be presumed to be invalid according to the principle laid down in No. 50, *Punjab Record*, 1893. The Courts below have accepted this contention. The first Court also held that the adoption was bad under Hindu Law. This however is a clear mistake and is due to a misconception of the prohibition against the adoption of a person whose mother could not have been married by the adopter. Mayne, Section 123, Bhattacharjia's *Hindu Law*, page 168. Under Hindu Law the adoption would be perfectly valid, and it is the plaintiff who is seeking to set up a custom opposed to his personal law who should prove such custom. Nor are we prepared to admit that the case is governed by No. 50, *Punjab Record*, 1893. The parties are not members of an agricultural tribe. They hold land and may have held it for more than one generation, but that does not bring them within the category of those to whom the ruling is applicable. Khatriis do not ordinarily form an agricultural but a trading community, and the usages of agriculturists cannot be presumed to apply to them; see remarks on this subject in No. 122, *Punjab Record*, 1893. This is especially true of Khatriis in the Rawalpindi District, where by far the great majority of agriculturists are Muhammadans and where the Khatri takes the place of the *bania* in South-Eastern Punjab in regard to trade and business transactions; Gazetteer, page 118. Major Oracroft's first Settlement Report, paragraphs 91 and 323½.

There is no evidence on the record showing the Khatriis of Sukhn to be agriculturists in the sense the term is applied to Jats and Rajputs for example. All that is shown is that plaintiff and Kartar Singh hold land for at least two generations. The total ancestral land held by Kartar Singh appears to be about 4 *ghumaos* 5 *kanals* 7 *marlas*, and it is doubtful whether, having regard to this circumstance, the allegation of respondent's counsel that he has never had any other means of subsistence but the income of his land can be safely accepted. However this may be, there is nothing to show that the parties belong to the class of agriculturists to whom No. 50, *Punjab Record*, 1893, is applicable, and the presumption is to the contrary.

We hold, therefore, that plaintiff cannot take the benefit of that ruling, but is bound to show affirmatively a custom whereby the adoption of a wife's brother's son is invalid.

Judged from this starting point, plaintiff cannot be said to have proved his case. The Courts below decided in his favour because they erroneously threw the *onus* of proving the validity of the adoption on the defendants. Plaintiff's oral evidence is insufficient to prove the custom, while the witnesses for the defence at least prove this much, that adoptions of this kind are not uncommon among Khattris in that part of the country. The record of customs of the Rawalpindi District, (see) answer to Question 32 seems to indicate an extensive and unrestricted power of adoption, and this so far is against the plaintiff's contention that the parties are bound by the custom of agriculturists of Eastern Punjab. We think upon a consideration of the whole case that the adoption of Gulab Singh cannot be presumed to be invalid by custom on *à priori* grounds, and that it has not been proved to be so by positive evidence. The plaintiff's claim for a declaration that it is bad must accordingly fail.

Respondent's counsel, however, asks us to hold that the transfer of land by Kartar Singh to Gulab Singh being an alienation of ancestral property to a non-agnate is invalid even though the adoption be good. He refers to the answer to Question 34 in the Record of Customs under the head of adoption and the agreement between plaintiff and Kartar Singh in 1880. We are of opinion, however, that the suit is not for setting aside the alienation, though the fact was mentioned in the plaint. We cannot by any means treat the plaint as expressly or impliedly asking for this relief. The pleadings certainly do not show it, and there was no issue on the point. We cannot therefore go into this question without an amendment of the plaint and a fresh issue and a further inquiry. We do not think a sufficiently strong case has been made out for our granting such an exceptional indulgence to the plaintiff at this stage. The plaintiff will be able to claim the relief, if he wishes to do so, when his cause of action for possession of the land will arise on Kartar Singh's death.

We accept the appeal and dismiss the plaintiff's claim, but as the circumstances are rather exceptional we leave the parties to pay their own costs throughout.

Appeal allowed.

No. 95.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

HARNAM SINGH,—(PLAINTIFF),—APPELLANT,

*Versus*MUSSAMMAT KISHNI AND ANOTHER,—(DEFENDANTS),
—RESPONDENTS.

} APPELLATE SIDE.

Case No. 1060 of 1898.

Custody of wife—Conduct of husband—Discretion of Court.

In suits for the custody of the person of a wife, the Court requires from the husband proof not merely that he is the husband of the woman, but also that he has done nothing to forfeit his right to such special relief by failure in his own duty towards his wife. He has to show not only that he is not estopped from exercising a claim or privilege, but that he has done his duty in the matter towards his wife so as to entitle him to claim this extreme exercise of authority on his behalf.

Where it appeared that plaintiff's wife, of whom custody was sought, had some time previously absconded with another man, against whom plaintiff instituted criminal proceedings under Section 498 of the Penal Code, which he subsequently compromised by divorcing his wife, and that the defendant, R. S., thereafter married the said woman by *karewa*, held, that inasmuch as plaintiff had done all he could to divest himself of connection with, and responsibility for, his wife, the Court was not justified in putting in force the discretionary power vested in it and giving plaintiff a decree for the custody of his wife.

Further appeal from the order of W. A. Harris, Esquire, Divisional Judge, Umballa Division, dated 14th July 1898.

Sangam Lal, for appellant.

Ram Chander, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—The plaintiff in this case sued for the custody of his wife, Mussammat Kishni, whom he had married by *karewa*. Of this fact there appears to be no doubt. But it appears that Mussammat Kishni absconded with another man; plaintiff instituted criminal proceedings under Section 498 and then plaintiff compromised matters by divorcing his wife, who was thus taken away by defendant Ran Singh, who, as is found by both Courts, has married her by *karewa*. 2nd March 1899.

Before us it was urged that the object of the compromise was simply to save Ran Singh from punishment, but as in order to do this plaintiff had simply to drop the prosecution we cannot see the force of this argument. It is further urged that plaintiff in view of the personal law to which he is subject could not divorce his wife. Into this point also

it is not for us to go. We are asked to exercise a jurisdiction in plaintiff's favour the exercise of which is discretionary and which is always one of grave consideration, and we have simply to see whether, as the case stands, we are justified in taking the strong step of granting to plaintiff an order for the custody of his wife, in view of his conduct to her. The principles which are to guide us are those followed in No. 6 of 1885. In that case a husband had allowed his wife to go away with another man and for nine years had made no effort to reclaim her. It was held that either he had made up his mind to give her up and let her go or else grossly neglected making the exertions due from him to keep his wife safe in his protection, in either of which cases he was entitled to no assistance from the Court. In this case no long time has been allowed to elapse, but there has been a deliberate relinquishment of his claim, an attempt at divorce, whether good or bad in law, and an acceptance of his wife's connection with Ran Singh which in our opinion disentitles the plaintiff to any assistance at our hands. We do not think that Section 115, Evidence Act, is so important an element in the case perhaps as it appeared to the lower Courts. The ground we stand on is rather that in the exercise of a special jurisdiction of this kind involving the custody of the person of a wife we require from the husband not merely proof that he is the husband, but that he has done nothing to forfeit his right to the special relief by failure in his own duty towards his wife. He has to show not merely that he is not estopped from exercising a claim or privilege but that he, too, has done his duty in the matter towards his wife so as to entitle him to claim this extreme exercise of authority on his behalf. In this case we are quite clear that he has not fulfilled these conditions, that so far as it lay in his power he abandoned his wife to another man to whom she is now married by *karewa*, and that he has forfeited his right to the assistance of the Courts. In the criminal case brought by Harnam Singh, present plaintiff, against Natha Singh and Ran Singh and Gurdit Singh, Harnam Singh put in an application on 19th November 1897 in which he states clearly that he has divorced Mussammat Kishni (*talak*), and that Mussammat Kishni had given up her claim against him for maintenance and property; that Harnam Singh, and Mussammat Kishni had now no connection at all with each other, and that as regards the defendants in that suit he wished to withdraw the charge (*razinama dela hun*). Clearly therefore the plaintiff had done all he could to divest himself of connection with and responsibility for his wife, and under these circumstances we do not consider ourselves justified in

putting in force the discretionary power vested in us and giving him a decree for the custody of his wife.

We dismiss the appeal with costs accordingly.

Appeal dismissed.

No. 96.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

MAN SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

DIP SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 863 of 1896.

Pre-emption—Act IV of 1872, Section 12—“Landowner” and “Landholder”—Purchaser of small plot of unculturable land.

Plaintiff, one of the old proprietary body with a large holding, claimed possession by pre-emption of certain land which had been sold by one M. to defendants by registered deed of sale. Defendants admitted plaintiff's right to pre-empt, but pleaded that their rights of pre-emption were equal as they also owned land in the same *taraf* as the land in question. It appeared that defendants owned 1 kanal 1½ *marlas* of land *ghair munkin chappar*, that is unculturable pond, which they purchased for Rs. 200. The point for decision was whether the possession of this plot of unculturable land constituted defendants-vendees “landowners or landholders” within the meaning of Section 12 (d) of Act IV of 1872.

Held, that defendants were not “landowners” or “landholders” within the meaning of the said section so as to be entitled to a right of pre-emption equal to that of plaintiff.

No. 153, *Punjab Record*, 1888, followed; No. 7, *Punjab Record*, 1896, distinguished.

Further appeal from the order of Sardar Gurdial Singh Man, Divisional Judge, Ferozepore Division, dated 17th July 1896.

Ishwar Das, for appellants.

Golak Nath, for respondent.

The judgments delivered by the learned Judges were as follows:—

ROBERTSON, J.—In this case one Dip Singh claimed possession, by pre-emption, of 47 kanals 15 *marlas* which had been sold by Misri, defendant-vendor, to defendants 2, 3, 4, defendants-vendees, by registered deed in which the sale money is entered at Rs. 900. The plaintiffs have admittedly a right to pre-empt, but defendant-vendee pleads that his right is equal as he also owns land in the same *taraf* (*i. e.*, *taraf adna*) as the land in question. It appears that defendant-vendee owns 1 kanal 1½

27th Feby. 1899.

marlas of land *ghair mumkin chappar* that is unculturable pond, not assessed to land revenue, and it appears that defendant-vendee purchased this land for Rs. 200, which means nearly Rs 1,500 a *ghumao* = acre of perfectly useless land. The main question in this case is whether the possession of this 1 *kanal* $1\frac{1}{2}$ *marlas* of unculturable land constitutes defendant-vendee a "landowner or landholder" under Section 12 (d) of Act IV of 1872. The patwari states that this possession gives defendant-vendee a right to culturable *shamilat* or common land, but it appears from the order of the arbitrators in partition proceedings in 1875 when the whole village common was partitioned, that everything which could be cultivated was then partitioned and nothing left but land which could not be broken up. The vendee purchased the 1 *kanal* $1\frac{1}{2}$ *marlas* on 6th April 1893 and the land in dispute on 21st April 1894. It certainly appears that the purchase of 1 *kanal* $1\frac{1}{2}$ *marlas* of perfectly useless land for a high price could have had only one object, *i. e.* to give the vendee a foothold in the village from which to resist pre-emption claims like the present.

Now it has undoubtedly been held that owners by purchase may come within the definition of Section 12, clause (4) of the Punjab Laws Act (*inter alia* Punjab Record, No. 42 of 1880), but in those cases the purchaser had been held to have become one of the proprietary body and to have acquired rights as such. In 153 of 1888 Sir Charles Roe laid down clearly the principles which govern cases of this class. He says that Act IV of 1872 makes the basis of the right the position of the would-be purchaser as a member of a compact body the village community, and confers no right on any one else whatever may be the extent of his property, moveable or immoveable. In that case it was held that the purchase of a small portion of the village site—*abadi*—did not constitute the purchaser to be a landowner or landholder under the Act. We quite concur in this principle, which is in no way contravened by No. 7 of 1896, in which the purchaser of 100 *bighas* of *shamilat* land, regarding which it was doubtful if it could be cultivated and assessed to land revenue, was held to have a right of pre-emption against an entire stranger. Here the plaintiff is one of the old proprietary body with a considerable holding, and the defendant-vendee has to base his right on the doubtful purchase of a small portion of an unculturable pond or *chappar* carefully set aside as *ghair mumkin* at partition, and clearly carrying with it, notwithstanding the entry in the deed, no right to share in any culturable waste. We hold that the plaintiff has clearly established a superior right of

pre-emption over the defendant-vendee, and we think that to hold otherwise would be quite contrary to the spirit of the Act and the general custom recognized by the Act.

As regards the issue of notice to the plaintiff, both the lower Courts have concurred in finding that no notice was in fact served on plaintiff, and we see no reason to differ from this view. The appeal is accordingly dismissed with costs.

CHATTERJI, J.—I concur. There is no essential difference between the position of the vendee in this case and that of the vendee in No. 153, *Punjab Record*, 1888, who bought a small plot in the *abadi*. The land is not assessed to revenue, and as the village is at present constituted and under the agreement among the proprietors is absolutely incapable of individual possession or enjoyment. Its purchase therefore has not made the vendee a proprietor or landowner in the village, that is a member of the village community any more than the purchase in No. 153, *Punjab Record*, 1888, made the purchaser so. No doubt it is possible that the land may be broken up for cultivation and charged with revenue. In the same way it is possible that *abadi* land may become attached to the culturable land of the village and revenue be assessed on it. But we have to decide on existing facts and not on bare possibilities. It seems to me that if the decision in No. 153, *Punjab Record*, 1888, is correct under the Act, and its correctness has not yet been successfully challenged, and there is absolutely no doubt that it lays down the true principles which govern the right of pre-emption in villages, the vendee in the present instance is not entitled to pre-emption. No. 7, *Punjab Record*, 1896, was a case of a quite different character.

Appeal dismissed.

No. 97.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Gordon Walker.

GANDA MAL,—(PLAINTIFF),—APPELLANT,

Versus

THAKAR MAL AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1190 of 1896.

Adoption of daughter's son—Hindu Law—Banias of Jayraon—Burden of proof—Omission to perform certain ceremonies.

Plaintiff sued for a declaration that a deed of adoption whereby defendant No. 1, plaintiff's brother, adopted his daughter's son, was invalid,

and would not affect plaintiff's reversionary rights. Plaintiff admitted the *factum* of adoption, but contended that it was illegal by "law and custom," and was, moreover, invalid owing to the non-performance of certain necessary ceremonies. The parties were *banias* of Jagraon. The lower Courts dealt with the question as one of custom, and dismissed the suit on the ground that the adoption had not been proved to be invalid by custom among the parties.

Held, that the parties being *bania* residents of a town, of the ordinary mercantile class, were governed by Hindu Law and not by custom, and that plaintiff had failed to prove that under Hindu Law a daughter's son was not a proper person to be adopted.

Held, further, that the *factum* of adoption not being disputed, and the daughter's son being a person who might legally be adopted, the adoption was not invalid on account of the omission of any particular ceremony.

I. L. R., XVII All., 294, followed.

Further appeal from the order of Captain C. S. Martinale, Divisional Judge, Umballa Division, dated 29th June 1896.

Sant Ram, for appellant.

Lajpat Rai, for respondents.

The judgment of the Court was delivered by—

1st March 1899.

GORDON WALKER, J.—The question at issue in this case is the validity of the adoption by a sonless man of his daughter's son. Parties are *banias* of the town of Jagraon, and plaintiff, who calls the adoption in question, is the brother of defendant No. 1 who made the adoption. The first point that ought to have been considered by the lower Courts was whether the case was to be decided by Hindu Law or not. The two issues framed by the first Court were with regard to custom, and both Courts have apparently dealt with the question as one of custom. In their pleadings both parties rely on "law and custom," while defendant expressly alleges that the adoption is valid according to Hindu Law.

It seems to us clear that the rule of decision in this case is to be looked for in the Hindu Law, the parties being *bania* residents of a town, of the ordinary mercantile class. There is no allegation of any custom or usage superseding the Hindu Law, the word *rawaj* being apparently used by parties in a loose way (*rawajan wa kanunan*) so as to cover the usage followed by the class to which the parties belong, not necessarily a custom apart from the Hindu Law.

The question of the validity of the adoption amongst Hindus of a daughter's son was very fully considered in *I. L. R., XVII All., 294*. We are prepared to accept the view of the majority of the Court which decided that case, that such an

adoption is not prohibited amongst the three regenerate classes, "and that consequently the *onus* of proving that such an adoption is prohibited by usage is upon him who alleges that it "is illegal." It is not, therefore, necessary to consider the other authorities in detail, but reference may be made to those bearing on the point which are quoted under para. 37 of the 5th edition of Rattigan's *Customary Law*. There is a distinction in the matter, it will be seen, between agriculturists and non-agriculturists, a daughter's son amongst the latter "being generally "recognized as a proper person to be adopted."

In the present inquiry six instances have been given of such adoptions in the town of Jagraon amongst *banias*, showing that the usage of the parties appears to be in accordance with the view of the Hindu Law which we are prepared to adopt.

The *factum* of the adoption is not denied; indeed it is alleged by the plaintiff, the only question raised being as to its validity. The adoption is stated to have been made from the time of the adopted son's birth, and it was confirmed by a registered deed, dated 15th November 1890. Important facts that may be noted in the case are that the adoptive father is the defendant who supports the adoption, and that at the time of institution of the suit the adopted son was nine years of age.

Some argument was addressed to us with regard to the invalidity of the adoption owing to the omission of certain ceremonies. In *I. L. R., VI All., 276*, the adopted son was a brother's child. But in the present case we are prepared to hold that the fact of adoption, *i.e.*, the giving and the taking of a son, not being in dispute, and the boy being one who might be adopted, the adoption would not be invalid on account of the omission of any particular ceremony.

For these reasons we agree with the lower Courts, and dismiss the appeal with costs.

Appeal dismissed.

No. 98.

Before Mr. Justice Anderson.

FATEH KHAN,—(PLAINTIFF),—APPELLANT,

Versus

MUHAMMAD & OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 1288 of 1898.

Pre-emption—Death of claimant pendente lite—Abatement of suit—Muham. madan Law—Punjab Laws Act, 1872, Section 5.

The plaintiff in a suit for pre-emption died *pendente lite*, whereupon his sons were brought on the record and obtained a decree. On appeal the

Divisional Judge *proprio motu* dismissed the suit on the ground that by Muhammadan Law, which was the personal law of the parties, the death of a person who claimed pre-emption caused the abatement of the suit.

Held, that under Section 5 of the Punjab Laws Act, 1872, Muhammadan Law, even though the parties were Muhammadans, was inapplicable to a claim for pre-emption in respect of agricultural land, and that a suit for pre-emption brought by a landowner respecting village lands should not be regarded as a merely personal action which must terminate on the death of the original plaintiff and does not survive to his representatives.

Further appeal from the decree of Kazi Muhammad Aslam, C. M. G., Divisional Judge, Jhelum Division, dated 8th August 1898.

Lal Chand, for appellant.

Harris, for respondents.

The judgment of the learned Judge was as follows:—

22nd Feby. 1899.

ANDERSON, J.—In this case Sherun and Fateh Khan, sons of Malak Khan Muhammad, who died whilst prosecuting a pre-emption suit, were brought on the record and obtained a decree.

This was appealed to the Court of the Divisional Judge of Jhelum on the merits, but the learned Judge did not go into these, but took up a point not raised in appeal, *viz.*, that according to Muhammadan Law, which was applicable to the parties, the death of the person who claimed pre-emption caused abatement of suit, and he thereupon accepted the appeal and dismissed the suit as brought in the name of the sons.

In appeal it is urged that by the provisions of Section 5 of the Punjab Laws Act, pre-emption is not one of the questions where the Muhammadan Law can be made the rule of decision even although the parties concerned be Muhammadans. I think there is no doubt that this contention must be allowed to prevail and that a suit for pre-emption brought by a landowner regarding village land should not be regarded as a merely personal action which must terminate on the death of the original plaintiff and does not survive to his representatives who will occupy his exact position in the village community. The practice of the Courts has been to substitute parties in pre-emption suits and to continue to hear pending suits. No objection was taken before the learned Divisional Judge as to the substitution of Malak Khan Muhammad's son against law, nor was it alleged that the suit had abated on his death.

In this view of the case, after hearing counsel, I accept the appeal, reverse the order of the Divisional Judge as on a

preliminary point, and remand the appeal for decision on the grounds set out in memorandum. This order is under Section 562, Civil Procedure Code. Costs of this Court to be costs in the cause and to follow the event.

Appeal allowed: cause remanded.

No. 99.

Before Mr. Justice Reid and Mr. Justice Gordon Walker.

MEHR CHAND,—(PLAINTIFF),—APPELLANT,

Versus

SYAD MUHAMMAD LATIF AND ANOTHER,—
(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 818 of 1896.

Joinder of parties—Suit by representative of deceased mortgagee, who has obtained certificate under Act VII of 1889—Necessity of impleading mortgagee's other heirs—Act VII of 1889, Sections 4, 16.

Plaintiff sued on the allegations that in 1883 defendant No. 1 mortgaged two houses to plaintiff's father for Rs. 2,000, and agreed to pay interest thereon at a specified rate, and the principal on demand; that plaintiff's father had died, and that plaintiff had obtained a certificate, under Act VII of 1889, for realisation of the debts due to the deceased, including the amount due on the said mortgage; that defendant No. 2 had purchased the said houses in execution sale with full knowledge of plaintiff's rights, and was now in possession thereof, and that defendant No. 1 despite demand had failed to pay the principal money or any interest since Sambat 1945. Plaintiff therefore prayed for recovery of a sum of Rs. 3,192 and costs, with a lien on the property mortgaged and recoverable by auction sale, and that defendant No. 1 be made personally liable for the amount of the decree and future interest. For defendants it was contended that the suit must fail by reason of the non-joinder as co-plaintiff of the deceased mortgagee's other son and co-heir, the latter being equally interested with plaintiff in the mortgage deed.

Held, that inasmuch as, according to the authorities, the relief sought in the present suit could not have been granted in its entirety without a certificate under Act VII of 1889, the certificate-holder, who represented the estate *qua* the particular debt just as fully as an executor or administrator, was entitled to sue alone without impleading the other heirs of the deceased mortgagee.

Further appeal from the decree of J. G. M. Rennie, Esq., Divisional Judge, Lahore Division, dated 4th May 1896.

Lal Chand, for appellant.

Grey, for respondents.

The judgment of the Court was delivered by

REID, J.—The summons issued to the legal representative of Wali Ji, respondent, who died on the 10th January 1897, 29th March 1899.

have been returned after service on Rajbai and Mussammât Jiwana Bai only. The pleader for the appellant, who is present in Court, states that he abandons his appeal against the other representatives of Wali Ji, in order that the appeal may proceed.

The first question for consideration is whether the suit must fail by reason of the plaintiff's brother, equally interested with him in the mortgage-deed sued on, executed in favour of their father, not having been joined as a party.

The suit was against the mortgagor and purchasers of his rights and interest, at execution sale, in the property mortgaged, which consists of two houses.

The relief sought was against the mortgaged property and the person of the mortgagor.

The plaintiff-appellant obtained a certificate, under Act VII of 1889, for realisation of debts due to his father, including the amount due on the mortgage in suit.

The first contention for him is that, inasmuch as he alone was entitled to obtain decrees for debts due to his father, and acquittance from him would afford, under Section 16 of the Act, full indemnity to all debtors as regards all payments made in respect of such debts, he was entitled to sue without joining his brother.

This contention has force.

Section 4 of the Act prevents a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to any part of the effects of the deceased, except on the production of *inter alia* a certificate under the Act having the debt specified therein, and Section 16 provides that the certificate shall be conclusive as against the persons owing such debts, and shall afford full indemnity to all such persons as regards all payments made in good faith in respect of such debts to the person to whom the certificate was granted.

Now there can be no doubt that payment of the sum due on the mortgage by the mortgagor to the plaintiff as certificate-holder would have absolved the mortgagor from liability to any other heir of the mortgagee, and the plaintiff's suit was properly framed against the mortgagor and the purchasers of the mortgaged property.

For the appellant reliance is placed on *Janaki Ballar Sen v. Hafiz Muhammad Ali Khan*, I. L. R., XIII Calc., 47, and *Fateh Chand v. Muhammad Bakhsh*, I. L. R., XVI All. (F. B.), 259, for the proposition that the relief sought could not have been decreed without a certificate.

For the respondents reliance is placed on *Raghu Nath Shaha v. Poresb Nath Pundari*, I. L. R., XV Calc., 54, *Kanchan Modi v. Baij Nath Singh*, I. L. R., XIX Calc., 336, and *Baid Nath Das v. Shamanand Das*, I. L. R., XXII Calc., 143, for the proposition that a certificate was unnecessary for the purposes of this suit, and that a suit by the certificate-holder alone could not succeed.

In XXII Calc., a suit was filed, without a certificate, by the heir of a mortgagee against the mortgagor, and the purchasers of the mortgaged property. The claim for recovery from the person of the mortgagor was dismissed, and that against the mortgaged property decreed. It was held that the absence of a certificate was not a bar to the decree against the mortgaged property in the hands of the purchaser, concurring in the dictum in XV Calc., that the purchaser of mortgaged property was in no sense a debtor to the mortgagee, and that a certificate was only necessary where a Court was asked to make a personal decree against a debtor. Reference was also made to the XIX Calc. case in which no personal decree was asked for against the mortgagors, although they were impleaded.

In each of these three cases the XIII Calc. ruling was distinguished on the ground that a personal decree against the mortgagor was asked for in that suit, while in them the relief sought was against the mortgaged property only.

In XVI All. the ruling in XIX Calc. was considered. The relief sought included a personal decree against the mortgagor, and the Full Bench held that money lent on the security of a mortgage is a debt due from the mortgagor to the mortgagee, although from the terms of the contract it may not be recoverable from the mortgagor personally, or except by a decree for sale of the mortgaged property, and that Section 4 of the Succession Certificate Act applies to suits for sale of the mortgaged property under Section 88 of the Transfer of Property Act.

Although that Act does not apply to this Province, the relief sought by the plaintiff was a decree for money "with a lien on the property mortgaged and recoverable by auction sale," so that the ruling is applicable.

The principle laid down in *Mussammat Bhugobutty Koor v. Bholanath Thakoor*, VIII W. R., 317, that the effect of a certificate under Act XXVII of 1860 to represent the estate of the deceased is that it is conclusive of the representative title against all debtors of the deceased, and affords full indemnity to all debtors paying debts to the certificate-holder, is embodied in Section 16 of the present Certificate Act above quoted.

Section 267, Act X, 1865, and Section 88, Act V, 1881, give an executor or administrator the same power to sue in respect of all causes of action that survive the deceased, and to exercise the same powers for the recovery of debts due to him at the time of his death as the deceased had when living, and Section 4, Act VII, 1889, places a certificate under the Act on the same footing as a probate or letters of administration, as regards a debt specified in the certificate.

We see no reason why a certificate-holder should not represent the estate, *qua* the particular debt, just as fully as an executor or administrator, and, holding on the authorities quoted that the relief sought in this suit could not have been granted in its entirety without a certificate, we hold that the certificate-holder could sue alone without impleading other heirs of the deceased mortgagee.

The next question for consideration is whether the appeal has abated so far as Rajbai and Mussammat Jiwana Bai, legal representatives of Wali Ji, defendant-respondent, are concerned. The appeal was filed on the 15th July 1896.

Wali Ji died on the 10th January 1897, and application for bringing his legal representatives on the record was made on the 16th February 1898, the applicant alleging that he became aware of Wali Ji's death in September 1897. His pleader alleges that the delay between September and February was due to the appellant having considerable difficulty in discovering the legal representatives, who were in Bombay. An attempt was made to induce us to believe that Wali Ji lived at Bombay and died there, and that the appellant was consequently unaware of his death until eight months after its occurrence, but the appellant declined to adduce evidence on this point, and we are satisfied that Wali Ji lived and died at Lahore, and that the delay in applying to bring his legal representatives on the record is absolutely unaccounted for except by laches. The appellant is a Mukhtar, residing at Lahore, and must be aware of the provisions of Sections 368 and 582 of the Code of Civil Procedure, and of Article 175 C. of the

second schedule to the Limitation Act, which he ignored, and as he has failed to satisfy us that he had sufficient cause for not making the application for substitution within the period prescribed, his appeal abates as against the legal representatives of Wali Ji.

Although the lower Appellate Court dealt with the question of consideration for the appellant's mortgage, and the question of the priority of the respondent, Sayad Muhammad Latif's mortgage, it arrived at no definite finding on these questions, and dismissed the suit on the ground that the appellant could not sue alone.

This being a preliminary point, we set aside the decree of the lower Appellate Court, and remand the appeal for decision of the remaining issues, under Section 562 of the Code of Civil Procedure, as between the appellant and the respondent, Sayad Muhammad Latif, whose costs will be costs in the cause, the Court-fee on the memorandum of appeal being refunded.

We note that no objection was taken by counsel for the respondents to the lower Appellate Court's finding, that the suit was not barred by the proceedings in the executing Court. The answering legal representatives of the respondent, Wali Ji, will be paid one set of costs by the appellant.

Full Bench.

No. 100.

*Before Mr. Justice Olark, Chief Judge, Mr. Justice Reid, and
Mr. Justice Gordon Walker.*

ZAFARYAH KHAN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

FATTEH RAM,—(DEFENDANT),—RESPONDENT.

Case No. 690 of 1896.

} APPELLATE SIDE.

Res judicata—House and land sold by one deed of sale—Suit in respect of house—Subsequent suit in respect of land—Finding in first suit that deed of sale was void, effect of, as regards subsequent suit.

A. had a decree against B., and in execution thereof attached a house belonging to B., whereupon C. objected that B. had conveyed the house to him by a deed of sale which covered the house in dispute, and also a building site. The objection was disallowed, and C. was referred to a suit which he brought, and in which it was held that the sale by B. to C. was fictitious and in fraud of creditors, and was therefore invalid. Subsequently A. attached the building site, and C. again objected on the same ground as before. The objections having been again disallowed, C. filed the present suit to establish his right to the building site. The question referred to

the Full Bench was whether the decision in the first suit as to the validity of the sale was binding on the parties in the second suit.

Held, by the Full Bench, that though the subject matter of the second suit was different, in the sense that in the one suit a plot of land and in the other a house was claimed, yet the material issue, whether the sale deed conveyed a title or was fictitious and fraudulent, was identical in both suits, and that, therefore, the finding thereon in the first suit operated as *res judicata*, and precluded the issue which it had decided being raised again between the same parties in a subsequent suit, the latter suit being within the jurisdiction of the Court which decided the prior suit.

Further appeal from the decree of S. Olifford, Esquire, Divisional Judge, Delhi Division, dated 4th April 1896.

Madan Gopal, for appellants.

Grey, for respondent.

The judgments of the learned Judges of the Divisional Bench were as follows :—

16th Dec. 1898.

CLARK, C. J.—This case was argued before us on 12th and 14th December. Counsel present as before.

Mr. Madan Gopal produced a power-of-attorney purporting to be from plaintiffs to Prem Sukh, who had instructed Mr. Madan Gopal.

Mr. Grey said his client had not appeared, but that he had telegraphed that plaintiffs had not, as a matter of fact, authorized Prem Sukh to conduct the appeal.

We examined a witness before whom plaintiffs had executed and registered the power-of-attorney in favour of Ram Sukh, and we held that Mr. Madan Gopal was authorised to conduct the appeal on behalf of plaintiffs.

The facts of the case are fully stated in the order of the Divisional Judge.

It is Prem Sukh who is the real plaintiff in this case, and it will be convenient to deal with him as the plaintiff in the case.

The first question for decision is whether this suit is *res judicata*. The following is a brief general statement of the facts as far as they are necessary for deciding this point.

On 5th February 1883 Prem Sukh purchased from Mus-sammatt Nur-ul-Nissa a *haveli* and some *sakni* land. Fatteh Ram, defendant, had a decree against her, and attached the *haveli*. Prem Sukh's objection to the attachment was disallowed, and he filed a suit to establish his right to the *haveli*. On the 27th November 1883 his suit was dismissed, it being held that the sale of the *haveli* was *farzi* in fraud of

the other creditors of Mussammat Nur-ul-Nissa. In 1894 Fattah Ram attached the *sakni* land; Prem Sukh (or rather his vendees, plaintiffs) objected. The objection was disallowed, then this suit was filed, and the Divisional Judge has held that the decision of 1883 makes it *res judicata* that the whole sale both of *haveli* and *sakni* land was *farzi*.

On behalf of Prem Sukh it is urged before us that the previous case referred only to the *haveli*, and is not *res judicata* as regards the *sakni* land, and the following authorities are quoted, *Punjab Record*, No. 51 of 1894, *I. L. R.*, *XV Mad.*, 264, *XI Bom.* 355, *XIX Bom.*, 206.

The last case is very similar to the present, and the two Judges who decided the case took different views on the particular point now under discussion :—

Mr. J. Scott said : “The matter directly and substantially in issue now is the right to one piece of land, the matter directly and substantially in issue in the previous proceeding was the right to another and totally distinct piece of land. No doubt the evidence used by the plaintiff in both cases is the same, *viz.*, deed of sale. But the title to the entire property was not in question. The land formerly in dispute may have been so small as not to justify further litigation. The land now in dispute is considerable in extent and value. The question of title to the one may not have been worth the fighting. Does acquiescence in the decision regarding the one preclude any question as regards the other? Both the spirit and the letter of the section are against such an estoppel. The title to the entire property was not in question. Still less the title to the property now in dispute. Thus the matter now in dispute was not in question in the former proceedings. As it was not then in controversy, the defendant is not estopped from raising the question now.”

Mr. Justice Jardine, on the other hand, said : “The subject matter then in litigation was a different piece of land which the present deed of sale purported to convey to plaintiff along with the piece of land now in litigation. I am of opinion that the validity of that deed was a matter directly and substantially in issue between the present parties in the execution proceedings, 48 of 1885, and that the question was heard and decided by the subordinate Judge in that proceedings.”

The real question therefore is whether the validity of the sale as a whole was a matter directly and substantially in issue

in the 1883 case. The issue fixed in that case only concerned the *haveli*, and there was no issue as to the validity of the deed of sale.

The determination of the validity of the deed of sale was only important as regards the *haveli*, and any inference to be drawn from that finding as regards the *sakni* land, which was not then in dispute, is merely incidental: I would hold that that suit only decided as to the validity of the sale of the *haveli*, and left the question of the validity of the sale of the *sakni* land untouched.

Mr. Grey for Fatteh Ram quoted *Law Report*, 12, *I. A.*, 16, *I. L. R.*, XIII *Bom.*, 32, and 15 *I. A.*, 66.

The two former were cases concerning, respectively, adoption and partition, where the status of the individual and of the family was concerned. The status must be determined once for all; it cannot be split up, as the property was in this case. These cases do not seem to me to be good precedents in this case. The last case quoted is one of an entirely different nature from the present case. I therefore hold that this claim to the *sakni* land is not *res judicata* by the decision of 1883.

With reference to the merits. The Divisional Judge held that there was nothing to show that the sale to Prem Sukh was fraudulent, and I agree with him. Mr. Grey does not deny that Prem Sukh was within his rights in trying to make an advantageous settlement of his debts at the expense of other creditors.

He urges that plaintiffs have no legal interest, and that if they have, the suit is really one for a declaratory decree, and that the case is such that the Court should exercise its discretion, and not grant a decree.

It is probable enough that Prem Sukh wanted to fight the case under cover of plaintiffs, thinking that they would be in a stronger position than he was, but I do not think that that is a matter of much concern to defendant. If Prem Sukh had chosen to give away his interests to plaintiffs, defendant would have had no *locus standi* to object. If plaintiffs are not put in any better position than Prem Sukh would have held himself, then defendant has no cause of complaint.

It is then argued that sale of 5th February 1883, taken together with the contemporaneous agreements, amounts to no more than a conditional mortgage. I have considered the deeds carefully, and am unable to accept the contention.

The sale was for Rs. 1,050, and Prem Sukh's undertaking to re-convey was only in case he got his whole debt, amounting to Rs. 1,900, paid back within a fixed time. It was further argued that the mortgage had been paid off, but absolutely no grounds for this contention were advanced. I would accept the appeal, and restore the decree of the first Court with costs throughout against Fatteh Ram.

GORDON WALKER, J.—It is with some hesitation that I record my inability to agree with my learned colleague on the question of *res judicata* involved in this case. But the point is of some importance apart from this particular case, and the decision may be a precedent, so that I think it is well that it should be decided authoritatively by this Court. 24th Dec. 1898.

To avoid confusion arising from the fact that Prem Sukh is not in name the plaintiff in this case, I will put the question as follows. A. has a decree against B. and attaches in execution a house belonging to B. C. objects that B. has conveyed the house to him by a deed of sale which covers the house in dispute and a building site. The objection is disallowed, and C. is referred to a suit which he brings. In that suit it is held that the sale by B. to C. is invalid because fictitious and in fraud of the creditors of B. Subsequently A. attaches the building site. C. objects on the same grounds as before, and is again referred to a suit which he brings, that is, the present suit. Is the first decision as to the validity of the sale binding on the parties in the second suit? In the case from which my learned colleague has quoted the learned Judges of the Bombay High Court appear to me to have taken diametrically opposite views. Mr. J. Scott appears to have held the view that it was merely a matter of using the same evidence (i.e., the deed of sale) in the two cases; but I think that the more correct view was taken by Mr. J. Jardine, that the validity of the deed was a matter "directly and substantially in issue" between the parties in the previous case, and that it was heard and finally decided in that case. It does not seem to me to be material what issues were actually framed in the first suit. The matter directly and substantially in issue in both cases was the same, *viz.*, the validity of the deed of sale, and this was heard and finally decided by the Court in the first suit, the sale being held to be colorable. I do not see how it is possible to restrict the finding in the first suit to the property then in dispute, and to hold that the sale was then found to be colorable only as regards that. What the Court found in the first

suit was that the deed was invalid because the transaction was colorable, and applying that finding to the property then in dispute, it decided the case as regards that property, though the whole property was not then in dispute. There was none the less a final decision as to the validity of the deed, and that question having been put substantially in issue and decided cannot now be again put in issue between the same parties.

Of the authorities quoted that referred to above (XIV Bom., 206) is the only one really in point, and the final decision in that case was on other grounds. But I would refer to the remarks by Mr. J. Jardine just following those quoted by my learned colleague. "His (the Subordinate Judge's) decision has not been reversed. *If that decision had been a final decision in a suit as distinguished from this execution proceeding it would, in my opinion, have created estoppel by res judicata according to the authorities quoted by Mr. Branson, the fact that the present suit relates to a different piece of land not being a circumstance taking the decision out of that rule.*" (Here follow the authorities.)

Following this opinion I am inclined to hold that the learned Divisional Judge was right in deciding that the decision of 1883 declaring the sale to be colorable is binding on the parties.

24th Dec. 1898.

CLARK, C. J.—As my learned colleague differs from me I would suggest referring the case to a Full Bench on the question whether the decision of 1883 makes it *res judicata* that the *sakni* land now claimed was not validly sold to Prem Sakh.

GORDON WALKER, J.—I agree. Refer.

The following judgments were delivered by the learned Judges who constituted the Full Bench :—

29th March 1899.

REID, J.—The facts are fully stated in the judgment of the learned Chief Judge, so far as they affect the question of *res judicata*. *Dinkar Ballal Chakradev v. Hari Shudhar Apte, I. L. R., XIV Bom., 207*, relied on by counsel on either side is not on all fours with the present appeal, in that the previous proceedings in that case were in execution, and no suit was filed to contest the order on the objection, which consequently became final under Section 283 of the Code of Civil Procedure. In the present case the plea of *res judicata* is based on the fact that a suit was instituted by the objector, and was dismissed on the ground that the sale under which

he claimed was fictitious and in fraud of creditors of the judgment-debtor, an issue having been framed on this point. The sale-deed purported to convey the property previously in suit and the property now in suit.

In the Bombay case *Scott, J.*, held that Section 13 of the Code did not bar the subsequent suit, because there was not the same subject matter in dispute in the two proceedings, different plots of land having been claimed and the title to the plot subsequently claimed not being in dispute in the former proceedings. For this reason he held that it was unnecessary to consider whether the decision in a proceeding in execution affected a claim in an independent suit.

Jardine, J., relying on authority, including *Pittapur Raja v. Buchi Sitayya*, I. L. R., VIII Mad. (P. C.), 219, held that if the previous decision had been a final decision in a suit, as distinguished from an execution proceeding, it would have created estoppel by *res judicata*, the validity of the deed which purported to convey to the plaintiff both plots of land being a matter directly and substantially in issue between the parties in the previous proceeding.

In the Pittapur Raja's case, in delivering their Lordships' judgment, Sir Barnes Peacock said: "It is true that the former suit did not relate to the same property as that which is the subject of the present suit, but the issue has been tried between them, by a Court of competent jurisdiction, whether Buchi Tainaya was adopted or not It was contended on the part of the plaintiff that the cases do not establish that an estoppel is binding unless the suit relates to the same subject matter, but it appears to their Lordships that the cases which have been referred to do not establish that position . . . The issue which was tried in the former suit in this case was whether Buchi Tainaya was adopted by Niladri Roi, and the issue which the plaintiff wishes to try in the present case is the same, whether Buchi Tainaya was the adopted son of Niladri Roi. Their Lordships are clearly of opinion that the issue which was tried in the former suit is the same as that which the plaintiff wished to be tried in this suit, and that the plaintiff is estopped from making the allegation which he claims now to support."

In *Ananta Bala Charya v. Damodhar Makund*, I. L. R., XIII Bom., 25, Birdwood and Parsons, J. said: "It cannot be held that the decision regarding the agreement of partition and

“on the question of partition affected only the piece of land
“then in dispute, and left the defendants free to urge again,
“in any subsequent suit, that the family was joint in all other
“respects and as to all other property.” In *Mussammatt
Kamini Debi v. Ashutosh Mukerji*, I. L. R., XVI Cal. (P. C.)
103, Lord Hobhouse, in delivering their Lordships’ judgments,
said: “The question arises under the will which contains a
“gift of the residue of his estate to a family idol . . . The sons
“of Madha Sudon (the *shebait* of the idol) of whom the principal
“appears to have been the present principal defendant, Ashu-
“tosh, complained that he had made improperly a sale of part
“of the testator’s property to one Adhur Chander Bancap . . .
“They also made the present plaintiff and other members of
“the family parties to the suit, and the suit was in effect one for
“establishing the will against everybody concerned . . . The
“present plaintiff appeared to defend that suit . . . There was
“not only an issue as to the genuineness of the will, but a further
“issue whether or no the plaintiffs had any right to have in-
“stituted the suit . . . The present plaintiff was not satisfied
“with the decree (that the suit be decreed; that the will be
“declared genuine), and she appealed to the High Court . . .
“which dismissed the appeal with costs. Their Lordships take
“that to be a decision that the will contains a gift of the entire
“property to the idol, that the members of the family take only
“maintenance from the offerings made to the idol, and that it
“is a valid and legal gift in every respect. Now what is the
“present suit? The present suit appears to their Lordships to
“be founded upon the total, or at least the partial, invalidity of
“the will. The first prayer of the plaint is, that upon a proper
“interpretation of the will of the said Ram Komal Mukarji the
“Court will be pleased to determine and settle those provisions
“which are valid and lawful and those which are illegal and invalid
“ . . . She sues on the ground that there is some invalidity some-
“where in the will, and that she, as heir-at-law, is entitled to take
“advantage of it . . . The case is governed by Section 13 of Act
“X, 1877, and the question is whether the point now raised is a
“point heard and determined by the Court in 1863, in a suit in
“which the present plaintiff was defendant, and the present
“defendants were plaintiffs. Their Lordships’ reasons have
“been assigned for thinking that the question of the invalidity
“of the will was a point decided in that suit; that it was de-
“cided that the will was wholly valid, and passed the entire
“estate to the idol, and that the same question cannot now be
“raised.”

In *Mowahaji v. Narayan Dhondhbat Pitre*, *I. L. R.*, *XI Bom.*, 355. West, J., in distinguishing between a suit for the forest or waste lands attached to a village and a suit for the cultivated lands of the same village said: "No doubt an adjudication or a material element of an adjudication between two parties is generally *res judicata* between them as to the same question arising between them in a future litigation. The identity of the question, however, may be affected by a difference of the corpus or object of the litigation, and also by a difference of the alleged infringement of the right (*causa petendi*) as well as of the right (*jus*) alleged by the plaintiffs, or of the persons or the character in which they take part in the litigation." His Lordship held that the difference between the law applicable to the forest as waste and that applicable to the cultivated lands constituted such a distinction that the decision in the prior case did not necessarily bar the subsequent suit.

In *Krishna Behari Roy v. Bunwari Lal Roy*, *I. L. R. I.*, *Calc.* (P. C.), 144, their Lordships of the Privy Council said: "By the general law, where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court as to the status of one of them in relation to the other, it cannot be again tried in another suit between them," and approved a *dictum* in *Soorjemonsee Dayee v. Suddanund Mohapatter*, *XII B. L. R.* (P. C.), 304, that the general law relating to *res judicata*, founded on the principle *nemo debet bis vexari pro eadem causa*, defined by Lord Hardwicke, in *Gregory v. Molesworth*, 3 *Stoyns*, 626, as preventing a question which had necessarily been decided, in effect though not in express terms, between parties to a suit, being raised as between them in any other suit in any other form, must be applied in interpreting the provisions of the Code of Civil Procedure.

In *Pahlwan Singh v. Risal Singh*, *I. L. R.*, *IV All.*, 55, a suit was filed for four instalments and interest due on a bond, interest being calculated from the date of execution. The defendants pleaded that interest ran only from date of default, but the claim was decreed. In a subsequent suit for subsequent instalments, with interest from the date of execution, it was held that the date from which interest should be calculated was *res judicata*. The judgment ran thus: "The subject matter, in the sense of the thing sued for, is, of course, different in each suit, but it is the 'matter in issue' not the 'subject matter' of the suit that forms the essential test of *res judicata* in the section. 'Matter in issue' is defined as matter from

“ which, either by itself or in connection with other matter, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows. (Indian Evidence Act, Section 3.) In the two suits of the parties now before us one common matter in issue was the question of the liability of the obligors of the bond, in regard to the amount of interest secured thereby. That question was determined in the previous suit and cannot be re-opened now.”

In *Chandu v. Kunhamed*, I. L. R., XIV Mad., 324, a suit was filed by certain members of a family against other members for their shares of certain property. One of the defendants pleaded that a *paraniha*, part of the property in suit, was impartible, and on issue framed the *paraniha* was held to be partible. In a suit filed by the mortgagee of one of the defendants for possession of the mortgagor's share, the plea was again raised that the *paraniha* was impartible. The Court held that the question was *res judicata*.

In *Shib Charan Lal v. Raghunath*, I. L. R. XVII All., 174, a suit was filed for a declaration of the plaintiff's right to possession of certain property as heir of the last owner. The suit was dismissed on the ground that the plaintiff was out of possession, and could not obtain a declaratory decree, but the issue of title was decided in his favour. The plaintiff then sued for possession, and it was held by Edge, C. J., and Bannerji, J., that the question of title was not *res judicata*, the finding that the plaintiff was not in possession being fatal to his suit; and no finding on the question of title being necessary the judgment proceeded: “ For findings to operate as *res judicata* they must have been findings upon which the decree or some operative part of it was made, and must have been findings which were necessary for the making of the decree in the way in which it or some operative part of it was made, and it is the decree read in the light of such findings.....which finally, within the meaning of Section 13, Act XIV of 1882, decides the matter in issue, or which might or ought to have been in issue, between the parties in the suit (Explanation II). The result appears to us to be that a finding in a judgment to operate as *res judicata*, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree or some operative part of it was made. The finding of fact, to operate as *res judicata*, need not

"have been the sole finding of fact upon which the decree was made, but it must have been a material and necessary finding of fact, material and necessary in the sense that the fact must have been found as it was found in the judgment, and could not have been found otherwise, for the decree as it was made to have been a good result in law from the fact or facts so found. Further, if there were two findings of fact, either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should, in the logical sequence of necessary issues, have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can, in our opinion, operate as *res judicata*."

In the present suit the plaintiffs claimed under the sale-deed, which was set up in the previous suit, having purchased from the original purchaser-plaintiff. The issues framed in the previous suit were :

- (1). Was the attached property Mussammat Nur-ul-Nissa's?
- (2). Were the sale (by Karam Bakhsh as Mussammat Nur-ul-Nissa's agent to the plaintiff) and mortgage executed in good faith or in fraud of creditors?
- (3). Was Karam Bakhsh authorised to sell?

The findings were that the sale of the house and land by Mussammat Nur-ul-Nissa in favour of the plaintiff was fictitious, and that Karam Bakhsh merely executed the sale-deed in collusion with the plaintiff to defraud creditors.

These findings were fatal to the claim, which was based on the sale-deed, and would be fatal to the subsequent suit based on the same sale-deed. The question for consideration is whether the genuineness of the sale is saved from being *res judicata* by reason of the subject matter of the previous suit having been the house, and that of the present suit being the land which the sale-deed purported to convey.

It has been contended for the appellant that most of the authorities quoted deal with status, and that the question now before the Court arises out of contract not out of status.

On the other hand, it has been contended that the title was in issue in both suits, and that a decision that the title deed is invalid precludes any further question of the validity of the title deed between the same parties

Now it appears to me that the only judgments deciding status which have a greater effect than other judgments in barring a subsequent decision on the same issue are those dealt with by Section 41 of the Evidence Act. These are final judgments, orders or decrees of competent Courts in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, and are commonly known as judgments *in rem*, being conclusive "against the whole world" as to the legal character or title in question. All other judgments are *inter partes*, and are conclusive only against specific parties, *i.e.*, parties and privies.

It appears to me to be immaterial whether the finding of fact is that a certain deed of partition was executed, or that a certain adoption was effected, or that a certain sale-deed was executed in good faith and for consideration, for the purposes of the application of the rule of *res judicata*. If the finding was, to use the words of Edge, C. J., material and necessary to support the precise and particular ground on which the decree was made, it operates as *res judicata*, and precludes the issue which it decided being raised again between the same parties in a subsequent suit, provided the subsequent suit is within the jurisdiction of the Court which decided the prior suit.

Here there is no contention that the parties are not identical, or that the suit is not within the jurisdiction of the Court which decided the prior suit.

To hold that an attaching creditor, in whose favour it has been held that a deed of sale under which an objector claimed does not convey a title, may be put to the trouble and expense of having the same question decided in a suit instituted against him by the same party in the same Court, for another part of the property which the sale-deed purported to convey, appears to me a violation of the rule *nemo debet bis vexari*. The subject matter of the second suit may be different in the sense that in the one suit a plot of land and in the other a house was claimed, but the material issue, whether the sale-deed set up conveyed a title or was fictitious and fraudulent is identical. An adverse decision on this issue would conclude the plaintiffs' suit, and would obviate the necessity of deciding any other issue.

For these reasons I would dismiss the appeal and dismiss the suit, holding it to be barred by Section 13, Act XIV of 1882, and order the appellant to pay his own and the respondent's costs in all Courts.

CLARK, C. J. (GORDON WALKER, J., concurring).—On 29th March 1899. further consideration and after carefully weighing Mr. Justice Reid's judgment I think the better view is that the validity of the sale as a whole was a matter directly and substantially in issue in the 1883 case, and that the question is *res judicata*.

The authorities have been fully discussed by my learned colleague, and I have nothing further to add.

The appeal is therefore dismissed with costs.

Appeal dismissed.

CRIMINAL JUDGMENTS,
1898.

INDEX

OF

CRIMINAL JUDGMENTS,

1898.

The references are to the Nos. given to the cases in the "Record."

No.

A.

Accomplice.—*Criminal Procedure Code*, 1882, Sections 337, 339, 436, 537—*Tender of pardon to accomplice*—*Sessions Judge withdrawing pardon and committing accomplice for trial*—*Authority of Magistrate to tender pardon.*
—See *Criminal Procedure Code*, 1882, Section 339.

"*Accused person.*"—See *Criminal Procedure Code*, 1882, Section 339.

Accused—*Witnesses called by.*—*Practice*—*Refusal of District Magistrate to summon witnesses for defence without expenses being paid by accused.*—
An order by a District Magistrate refusing to summon witnesses for the defence without their expenses being paid by the accused, although legal, should be passed very sparingly, and is an improper order in a case where the accused is unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, especially if the case is one in which a severe sentence is inflicted ...

7

Acquittal—*Appeal by Government from.*—See *Appeal in Criminal Cases*, No. 3.

Acts :—

Act XXXVII of 1850.—See *Sanction for Prosecution*, No. 3.

Act XIII of 1855.—See *Criminal Procedure Code*, 1898, Section 545.

Act XIII of 1859.—See *Criminal Procedure Code*, 1898, Section 5.

Act XLV of 1865.—See *Penal Code*.

Act III of 1867.—See *Gambling Act*, 1867.

Act X of 1873.—See *Oaths Act*, 1873.

Act I of 1879.—See *Stamp Act*, 1879.

Act X of 1882.—See *Criminal Procedure Code*, 1882.

Act XX of 1891.—See *Punjab Municipal Act*, 1891.

Act XII of 1896.—See *Excise Act*, 1896.

Act V of 1898.—See *Criminal Procedure Code*, 1898.

Alteration of date of trial.—See *Criminal Trial*.

Appeal in Criminal Cases.—*Criminal Procedure Code*, 1882, Sections 30, 35, 337, 380—*Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge*—*Appeal by accused to Sessions Judge*—*Procedure*—*District Magistrate at whose instance pardon was tendered to*

The references are to the Nos. given to the cases in the "Record."

No.

approvers trying case himself—*Penal Code, Section 395.*—The District Magistrate of Gurgaon, with enhanced powers under Section 30 of the Criminal Procedure Code, charged certain persons with three separate offences of dacoity, and tried them for the same at one trial. He convicted four of the accused, and passed on them aggregate sentences of 5, 7, 7 and 5 years, respectively, but overlooked the fact that, under Section 35 of the Code, such sentences were single sentences requiring confirmation of the Sessions Judges, and did not submit them for confirmation. The accused appealed to the Sessions Judge, who submitted the files to the Chief Court, with a recommendation that the convictions should be quashed on the revision side, and the District Magistrate directed to commit the accused to the Sessions. The principal ground for the recommendation was that the District Magistrate, having tendered a pardon to two approvers, and having examined them, was, by the last paragraph of Section 337 of the Code, incapacitated from trying the case himself. It appeared that the pardons were tendered to the approvers by a Magistrate of the 1st class at the instance, or with the sanction, of the District Magistrate, and that the approvers were examined by the former Magistrate, and were subsequently examined by the District Magistrate in the course of the trial.

Held, that the omission by the District Magistrate to duly submit the sentences for confirmation could not operate to change the course of appeal, and that the Sessions Judge on having the cases brought to his notice through the medium of an appeal, should have proceeded to exercise his confirmatory jurisdiction under Section 380 of the Code whereupon the appeals would have lain to the Chief Court under Section 408.

Held, further, that the provisions of Section 337 of the Code must be construed strictly, and that the disqualification created by the last paragraph applies only to that Magistrate before whom the suspected person is brought face to face, and who attempts to induce him by promise of pardon to make a full and true disclosure, the examination referred to in the said paragraph being the one made on the tender of the pardon and directly resulting from it, and not the examination of the approvers in the course of the trial

3

Appeal in Criminal Cases.—*Criminal appeal*—*Duty of Appellate Court to consider facts of case*—*Doubts entertained by Appellate Court.*—Though in criminal cases an Appellate Court should be guided in its estimate of the evidence of a witness by remarks recorded by the first Court, under Section 363, Criminal Procedure Code, as to the demeanour of that witness, such Appellate Court is bound to independently consider the facts of the case, and the prisoner is entitled to the benefit of reasonable doubt in the appellate no less than in the first Court.

Where, therefore, the Sessions Judge admitted that he was "perplexed by the difficulties and incongruities of the case," but upheld the conviction on the ground that an Appellate Court should not interfere with the finding of the first Court unless clearly convinced that it was erroneous, *held*, that the judgment of the Sessions Judge must be set aside, and the appeal heard *de novo*.

The references are to the Nos. given to the cases in the "Record."

	No.
The Chief Court, therefore, transferred the appeal, under Section 526 of the Criminal Procedure Code, to itself for trial, and, after hearing counsel on the facts, reversed the conviction of the accused ...	6
<i>Appeal in Criminal Cases.—Appeal by Government from order of acquittal—Appeals in petty cases.</i>	
<i>Held</i> , that appeals by Government from orders of acquittal should be made only in cases of some importance	5
C.	
<i>Compensation—Power of Criminal Court to grant.—See Criminal Procedure Code, 1898, Section 545.</i>	
<i>Confirmation of Sentence.—See Appeal in Criminal Cases.</i>	
<i>Confiscation of property.—Gambling Act, 1867, Sections 8, 11—Confiscation of property belonging to person acquitted on trial.—The words "on conviction" in Section 8 of the Gambling Act, 1867, are intended to confer jurisdiction to order forfeiture only in cases where there is a conviction, and clearly mean that it cannot be exercised where there is no conviction. Nor, even where there is a conviction, is the power to order forfeiture unlimited, such power being necessarily restricted to property belonging to convicted persons, and not extending to property belonging to persons sent up for trial but acquitted under Section 11 of the Act</i>	5
" " <i>Excise Act, 1896, Section 51—Animals and conveyance liable to confiscation.—Accused was found with 1½ seer of country liquor in his possession. He was carrying it in two bottles in his waistcoat pockets, and was riding on a mare at the time. He was convicted under Section 51 of the Excise Act, 1896, and sentenced to a fine of Rs. 20, and the mare on which he was riding was confiscated.</i>	
<i>Held</i> , that the order confiscating the mare, even if legal, was harsh and unnecessary, and must be set aside.	
<i>Semle</i> : Animals and conveyances liable to confiscation under the Act are those on which illicit liquor is loaded, and an animal on which a man is merely riding with such liquor in his pockets does not come under that description	10
<i>Criminal Courts—Subordination of.—Criminal Procedure Code, 1898, Section 195 (7)—Sanction for prosecution.—For the purposes of Section 195, Criminal Procedure Code, 1898, the Court of the District Judge is the Court to which a Munsif is subordinate, and it is the Court of the District Judge and not of the Divisional Judge which can give sanction for prosecution in respect of offences referred to in the said section when committed in the Court of a Munsif</i>	16
<i>Criminal Procedure Code, 1882.—Section 30.—See Appeal in Criminal Cases, No. 1.</i>	
" " " <i>Section 35.—See Appeal in Criminal Cases, No. 1.</i>	
" " " <i>Section 110.—Criminal Procedure Code, 1882. Section 110—Security for good behaviour—General reputation.—For a man to have a bad general reputation it is not necessary that there should be no one to give him a good character, but it is necessary that the evidence should be so strong as to leave no doubt what a man's general</i>	

The references are to the Nos. given to the cases in the "Record."

No.

repute is. When, therefore, as good witnesses come forward to state that a man's reputation is good as those who states the contrary, it cannot be said that his reputation is bad, unless there is something to corroborate the witnesses against him,—No. 2, *Punjab Record*, 1897, Criminal, explained 2

Criminal Procedure Code, 1882.—Section 110—Security for good behaviour—General repute—Evidence—Personal knowledge of Magistrate.—Accused, who was a lambardar of Kalian, in the Chiniot *tahsil*, was ordered by the Magistrate to execute a bond for Rs. 1,000, with two sureties, for his good behaviour for a period of three years. It appeared that twenty-one persons gave evidence to the effect that accused was a habitual receiver of stolen property, while thirty-eight persons testified that he was by general repute a man of unblemished character. The order of the Magistrate was confirmed on appeal by the District Magistrate, who concluded his judgment by stating that he personally knew the accused to be a well-known receiver of stolen property, knowing it to be stolen. The accused applied to the Chief Court on the revision side.

Held, that the burden of proving an accused's bad character lies on the prosecution, and that, therefore, when the evidence on both sides is, as the Court found to be in the present case, of an indifferent and interested character, the prosecution must fail.

Evidence, as a rule, should be tested by its quality rather than by its quantity.

Held, further, that the case should have been decided solely on evidence taken in Court, and that the District Magistrate was not entitled to rely on his own personal knowledge.

The law regarding security for good behaviour is a hard law which can easily be used as an instrument of oppression, and should not, therefore, be enforced except on the best possible grounds. It is incumbent on Magistrates in such cases to exercise the greatest caution and impartiality, and to be careful not to be influenced by outside gossip and vague rumour 4

"No. 1."—Section 339, *infra*. Section 337.—See *Appeal in Criminal Cases*,

"Sections 337, 339, 436, 537.—Tender of pardon to accomplice—Sessions Judge withdrawing pardon and committing accomplice for trial—Authority of Magistrate to tender pardon.—Two women were suspected of the murder of one K. S., and it appeared from the record that a Magistrate of the 1st class tendered a pardon (which was accepted) to one of them, Mussammat T., before the case was *chalan'd* to him by the Police, and committed the other, Mussammat D., to the Sessions Court for trial on a charge of murder. Mussammat T. gave evidence as a witness against Mussammat D., both before the committing Magistrate and in the Court of Sessions. The Sessions Judge, in acquitting Mussammat D., directed the withdrawal of Mussammat T.'s pardon, which he also found to

The references are to the Nos. given to the cases in the "Record."

No.

have been given without proper authority and her commitment for trial on a charge of murder. Mussammat T. applied to the Chief Court to set this order aside.

Held, that the order of the Sessions Judge must be regarded as one under Section 436 of the Criminal Procedure Code, for although there had as yet been no formal discharge of Mussammat T., yet as she had been ordered to be placed on bail by the Magistrate as required by Section 337 of the Code, she must be regarded as an accused person till the close of the trial of Mussammat D., when there would necessarily be either a formal order for her discharge or for her commitment for trial, and it was then competent for the Sessions Judge, if he thought proper to direct, under Section 436, her commitment without waiting for a Magistrate to formally, and in the opinion of the Sessions Judge improperly, discharge her.

Section 339, Criminal Procedure Code, makes no provision for the mode in which a pardon is to be withdrawn, and the Magistrate or Court who could have placed the person accepting the pardon on his trial in the first instance, is competent to do so notwithstanding the pardon, if such Magistrate or Court considers that the conditions of the pardon have not been fulfilled. When the person holding the pardon is placed on his trial, he will first plead his pardon, and if he proves that it was in fact granted, he will be entitled to an acquittal unless the prosecution proves that (1) the accused has wilfully concealed material facts, or (2) has given false evidence.

When a pardon has been tendered and accepted in good faith, the fact that the Magistrate had no power to tender such pardon is a defect expressly cured by Section 537 of the Code 1

Criminal Procedure Code, 1882.—Section 380.—See Appeal in Criminal Cases, No. 1.

" " " Section 436.—See Section 339, *supra*.

" " " Section 537.—See Section 339, *supra*.

Criminal Procedure Code, 1898.—Section 5—Act XIII of 1859—Criminal Procedure Code, 1898, Sections 5, 83—Execution of warrants issued under Act XIII of 1859.—There is nothing in Section 5, read with Section 83 of the Criminal Procedure Code, 1898, which excludes from the operation of the latter section warrants issued under Act XIII of 1859.

Held, therefore, that a Magistrate has no discretion to decline to execute warrants issued by a Magistrate of another district under Section 1 of Act XIII of 1859, and forwarded to him for execution under Section 83 of the Criminal Procedure Code against persons resident in his district 11

" " " Section 83.—See Section 5, *supra*.

" " " Sections 190, 191.—*Criminal Procedure Code, 1898, Sections 190 (1) (c), 191, 534—Omission to comply with requirements of Section 191 of the Code.—The Magistrate having taken cognizance of an offence under clause (c) of sub-section (1) of Section 190 of the Criminal Procedure Code, 1898, proceeded to try the*

The references are to the Nos. given to the cases in the "Record."

No.

case himself, and before commencing to record evidence omitted to inform the accused that he was entitled to have the case tried by another Court as prescribed by Section 191 of the Code. The accused having been convicted appealed to the Sessions Judge, and made it one of the grounds of his appeal that the omission to comply with the term of Section 191, invalidated the trial. The Sessions Judge, however, overruled this contention, relying on the analogy of Section 534 of the Code.

Held, that inasmuch as the Magistrate had interested himself very considerably in instituting the prosecution, and as his mind could not under the circumstances have been completely free from bias, it was incumbent on him to comply with the terms of Section 191, and to afford the accused an opportunity of making his election.

The Court accordingly set aside the conviction and ordered a new trial before another Magistrate

13

Criminal Procedure Code, 1898, Section 195.—*Sanction for prosecution—Subordination of Courts.*—See *Criminal Courts, Subordination of*—

" " " Section 534.—See Sections 190, 191, *supra*.

" " " Section 545—*Criminal Procedure Code*, 1898, Section 545—*Culpable homicide—Power of Court to grant compensation—Act XIII of 1855—"Injury"—Penal Code*, Section 44—*Enhancement of sentence.*

Held, by the Full Bench, that it is competent to a Court, under Section 545 of the Criminal Procedure Code, 1898, to award part of the fine imposed under Section 304 of the Penal Code for the offence of culpable homicide not amounting to murder to the widow of the person killed, in compensation for the injury caused by the offence committed, the loss of her husband's support affecting a widow prejudicially in a legal right, and being therefore "an injury" as defined in Section 44 of the Penal Code, for which substantial compensation can be awarded by a Civil Court (*I. L. R.*, *XII Mad.*, 352, and *I. L. R.*, *XXI Mad.*, 74 (F. B.), *not followed*).

Where the accused, enraged by vile abuse addressed to him by deceased, struck the latter a severe blow on the head with the first thing that came to hand, *viz.*, a wooden lamp-stand, which blow fractured the skull and caused death not long afterwards, *held*, by the Division Bench that a sentence of two years' rigorous imprisonment, including two months' solitary confinement and a fine of Rs. 100, or, in default, six months' further rigorous imprisonment, passed by the District Magistrate was, under the circumstances of the case, not inadequate, and should not be enhanced.

Per Chatterji, J. (in Chambers).—An enhancement of sentence should take place only when the sentence awarded is manifestly inadequate, and the powers of the Chief Court for such purpose should be exercised only under exceptional circumstances

17

Criminal trial.—*Practice—Refusal of District Magistrate to summon witnesses for defence without expenses being paid by accused.*—An order by a District Magistrate refusing to summon witnesses for the defence without their expenses being paid by the accused, although legal, should be passed

The references are to the Nos. given to the cases in the "Record."

No.

very sparingly, and is an improper order in a case where the accused is unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, specially if the case is one in which a severe sentence is inflicted

7

Criminal trial.—Hearing fixed for specified date, but subsequently accelerated—Accused's pleader unable to attend at hearing on altered date.—On the 16th May the trial of accused was fixed for the 26th May and petitioners' chief pleader was informed of the latter date, but on the 17th the date of hearing was changed to the 18th. The said pleader was informed of the change by telegram, and in reply telegraphed to the effect that he could not appear on the 18th, and asked to have the hearing fixed for the 23rd. Contrary, however, to this request and the wishes of the accused's other pleaders, the trial was proceeded with on the 18th, and continued till the 21st, when the case was decided and accused convicted.

Held, that the procedure of the Magistrate was improper, and gave accused just cause for complaint. If there were any reasons for accelerating the date of hearing, the trial should not have been concluded and judgment pronounced without waiting until the date desired by accused's pleader or the date originally fixed, hearing the pleader and allowing him to recall any of the witnesses he wished.

The Chief Court, however, refused to order a re-trial of accused on the ground that the irregularity and impropriety of the procedure had not, under the circumstances of this case, occasioned any failure of justice

14

D.

Date fixed for Criminal trial, alteration of.—See *Criminal trial*, No. 2.

Disqualification of Magistrate.—*Criminal Procedure Code*, 1882, Sections 30, 35, 337, 380—Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge—Appeal by accused to Sessions Judge—Procedure—District Magistrate at whose instance pardon was tendered to approvers trying case himself—*Penal Code*, Section 395.—See *Appeal in Criminal Cases*, No. 1.

E.

Enhancement of Sentence.—See *Criminal Procedure Code*, 1898, Section 545.

Evidence as to character.—See *Criminal Procedure Code*, 1882, Section 110, No. 2.

Evidence—False.—See *Sanction for prosecution*.

Excise Act, 1896.—Section 51.—*Excise Act*, 1896, Section 51.—*Animals and conveyances liable to confiscation.*—Accused was found with 1½ seer of country liquor in his possession. He was carrying it in two bottles in his waistcoat pockets, and was riding on a mare at the time. He was convicted under Section 51 of the Excise Act, 1896, and sentenced to a fine of Rs. 20, and the mare on which he was riding was confiscated.

Held, that the order confiscating the mare, even if legal, was harsh and unnecessary, and must be set aside.

The references are to the Nos. given to the cases in the "Record."

No.

Semble : Animals and conveyances liable to confiscation under the Act are those on which illicit liquor is loaded, and an animal on which a man is merely riding with such liquor in his pockets does not come under that description 10

F.

False Evidence.—See *Sanction for prosecution*.—

G.

Gambling Act, 1867.—*Gambling Act, 1867, Sections 8, 11*—*Confiscation of property belonging to person acquitted on trial*.—The words "on conviction" in Section 8 of the *Gambling Act, 1867*, are intended to confer jurisdiction to order forfeiture only in cases where there is a conviction, and clearly mean that it cannot be exercised where there is no conviction. Nor, even where there is a conviction, is the power to order forfeiture unlimited, such power being necessarily restricted to property belonging to convicted persons, and not extending to property belonging to persons sent up for trial, but acquitted under Section 11 of the Act 5

"General Reputation".—See *Criminal Procedure Code, 1882, Section 110*.

Good behaviour—*Security for*.—See *Criminal Procedure Code, 1882, Section 110*.

Goods clerk—*Public Servant*.—See *Penal Code, Section 161*.

Government—*Appeal by, from order of acquittal*.—See *Appeal, Criminal Cases, No. 3*.

M.

Magistrate.—*Criminal Procedure Code, 1882, Sections 30, 35, 337, 380*—*Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge*—*Appeal by accused to Sessions Judge*—*Procedure—District Magistrate at whose instance pardon was tendered to approvers trying case himself*—*Penal Code, Section 395*.—See *Appeal in Criminal Cases, No. 1*.

" *Criminal Procedure Code, 1882, Section 110*—*Security for good behaviour*—*General repute*—*Evidence*—*Personal knowledge of Magistrate*.—See *Criminal Procedure Code, 1882, Section 110*.

O.

Oaths Act, 1873.—See *Sanction for Prosecution, No. 3*.

P.

Pardon.—*Criminal Procedure Code, 1882, Sections 30, 35, 337, 380*—*Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge*—*Appeal by accused to Sessions Judge*—*Procedure—District Magistrate at whose instance pardon was tendered to approvers trying case himself*—*Penal Code, Section 395*.—See *Appeal in Criminal Cases, No. 1*.

" *Criminal Procedure Code, 1882, Sections 337, 339, 436, 537*.—*Tender of pardon to accomplice*—*Sessions Judge withdrawing pardon and committing accomplice for trial*—*Authority of Magistrate to tender pardon*.—See *Criminal Procedure Code, 1882, Section 339*.

The references are to the Nos. given to the cases in the "Record."

No.

Penal Code—Section 44.—Criminal Procedure Code, 1898, Section 545—Oulpable homicide—Power of Court to grant compensation—Act XIII of 1855—"Injury."—See Criminal Procedure Code, 1898, Section 545.

„ „ *Section 161.—"Public servant"—Railway Act, 1890, Sections 3, 137—Railway servant at time of offence temporarily employed in service other than that of a Railway—Goods clerk.—A goods clerk employed by a Railway Administration is a Railway servant within the meaning of Section 3 (7) of the Railways Act, 1890, and under Section 137 of the said Act, is also a public servant for the purposes of Chapter IX of the Indian Penal Code.*

Railway servants proper as long as they do not cease to be such continue to be "public servants" for the purposes of Chapter IX of the Indian Penal Code, whatever functions they may be temporarily discharging at the time when the offence by, or in respect of, them is committed.

A goods clerk in the employment of a Railway Administration suspected certain frauds in the goods office, and made a report to that effect to his superiors. The matter was subsequently taken up by the Police, and brought to the cognizance of the District Magistrate, who referred it to the Police for inquiry. The goods clerk had meanwhile been deputed to assist the Police in the discovery and prosecution of the culprits, and while on such duty was approached by the accused, who offered him Rs. 500 if he closed the inquiry, and returned the books unchecked. The goods clerk, who was throughout in communication with the Police, contrived to have the conversation overheard by witnesses, and asked the accused to bring the money. They did so, and were arrested by the Police in the act of handing it over to the clerk. The District Magistrate convicted the accused under the second clause of Section 161 of the Penal Code, but they were acquitted on appeal by the Sessions Judge, on the ground that at the time of the offence the clerk was employed to assist the Police in the inquiry, and was not, therefore, at that time a Railway servant, as defined in Section 3 (7) of the Railways Act, 1890, and consequently, not a "public servant" for the purposes of Chapter IX of the Penal Code. On appeal by Government against the order of acquittal,

Held, that inasmuch as the goods clerk had not at the time of the offence any official functions in the discharge of which he could have shown the favour in consideration of which the bribe was offered, the offence was not covered by the second clause of Section 161, Penal Code.

But, *held*, that the offence fell under the third clause of Section 161.

The accused thought that the clerk alone possessed the technical knowledge necessary to bring home the suspected fraud to them from the records of the goods office, and that if he represented to the Police that there was nothing disclosed in the accused's books, on comparison with the Railway records, to prove anything against them, he would probably succeed in persuading the Police Inspector in charge of inquiry, who was a public servant, acting as such, to make a report to that effect to the District Magistrate, and to get the case dismissed and the books returned

The references are to the Nos. given to the cases in the "Record."

No.

Penal Code—Section 193.—Sanction for prosecution—Penal Code, Section 193—False evidence—Inquiry under Act XXXVII of 1850—Repeal of Section 17 of Act XXXVII of 1850, effect of—Oaths Act, 1873, Sections 4, 14—Validity of sanction.—See Sanction for Prosecution, No. 3.

„ „ *Section 194.—Penal Code, Section 194—Sanction for prosecution.—Where an application is made for sanction for prosecution for an offence punishable under Section 194 of the Penal Code, either the application or the sanction should indicate to the person to be prosecuted what story or statement is alleged to be false* 8

„ „ *Sections 451, 456.—Penal Code, Sections 451, 456, 509—Intention to commit offence—Rescue from illegal arrest.—In a case where it was proved that the accused was found at night inside complainant's house, where he had gone for the purpose of visiting the latter's widowed daughter-in-law, a woman of loose character, with whose knowledge and consent he had in all probability entered the room.*

Held, by the Chief Court, on the revision side, that accused had been wrongly convicted under Section 456 of the Penal Code, as he had none of the intentions necessary to constitute the offence described in Section 451 of the Code, and could hardly have had the intention of committing the offence described in Section 509.

Held, therefore, that inasmuch as the apprehension of accused was illegal under Section 59 of the Criminal Procedure Code, his conviction under Section 224, and that of his brother's, under Section 225 of the Penal Code, must be set aside 12

„ „ *Section 509.—See Sections 451, 456, supra.*

Perjury—See Penal Code, Section 194.

„ *Sanction for Prosecution, No. 3.*

Public Servant.—See Penal Code, Section 161.

R.

Railway Act, 1890.—Sections 3, 137—See Penal Code, Section 161.

Rescue from arrest.—See Penal Code, Section 456.

S.

Sanction for Prosecution.—Criminal Courts, Subordination of—Criminal Procedure Code, 1898, Section 195 (7).—See Criminal Courts, Subordination of.

„ „ *Penal Code, Section 194—Sanction for prosecution.—See Penal Code, Section 194.*

„ „ *Sanction for prosecution—Penal Code, Section 193—False evidence—Inquiry under Act XXXVII of 1850—Repeal of Section 17 of Act XXXVII of 1850, effect of—Oaths Act, 1873, Sections 4, 14—Validity of sanction.—Certain persons having given evidence before Commissioners appointed under Act XXXVII of 1850 to hold an inquiry into the behaviour of certain Judicial Officer, the said Commissioners thereafter on the application of the Government Advocate, but without notice to the accused, granted sanction for their prosecution under Section 193 of the Penal Code. At the commencement of the*

The references are to the Nos. given to the cases in the "Record."

No.

trial before the District Magistrate, preliminary objections were taken as to the nature and validity of the sanction, but were overruled, whereupon accused applied to the Chief Court on the revision side, and it was contended, on their behalf, that the sanction should be set aside because, *inter alia*, (1) the repeal of Section 17 of Act XXXVII of 1850 by Act XII of 1876 showed that it was not intended that witnesses who gave false evidence before a Commission appointed under the first-mentioned Act should be punished therefor, and (2) the sanction was vague and indefinite, granted without notice to accused, and was not necessary for the ends of justice.

Held, that Section 17 of Act XXXVII of 1850 had been repealed merely because the provision therein contained had been rendered obsolete by the enactment of the Penal Code and the Oaths Act, 1873, and that inasmuch as the Commissioners were empowered under Act XXXVII of 1850 to receive and record evidence, they were authorised under Section 4 of the Oaths Act to administer oaths and affirmations in the exercise of the power so conferred on them.

Held, therefore, that under Section 14 of the Oaths Act, witnesses examined before the said Commissioners were bound to state the truth, and rendered themselves liable to be prosecuted under Section 193 of the Penal Code if they testified falsely.

Held, further, that the sanction, read as it should be with the application for sanction, was sufficiently explicit; that under the circumstances of the case previous notice to the accused was unnecessary, and finally that the prosecution of witnesses, who gave false evidence in an inquiry such as that in question was obviously in the interests of justice

18

Security for good behaviour.—See *Criminal Procedure Code*, 1882, *Section* 110.

Sentence—Enhancement of.—See *Criminal Procedure Code*, 1898, *Section* 545.

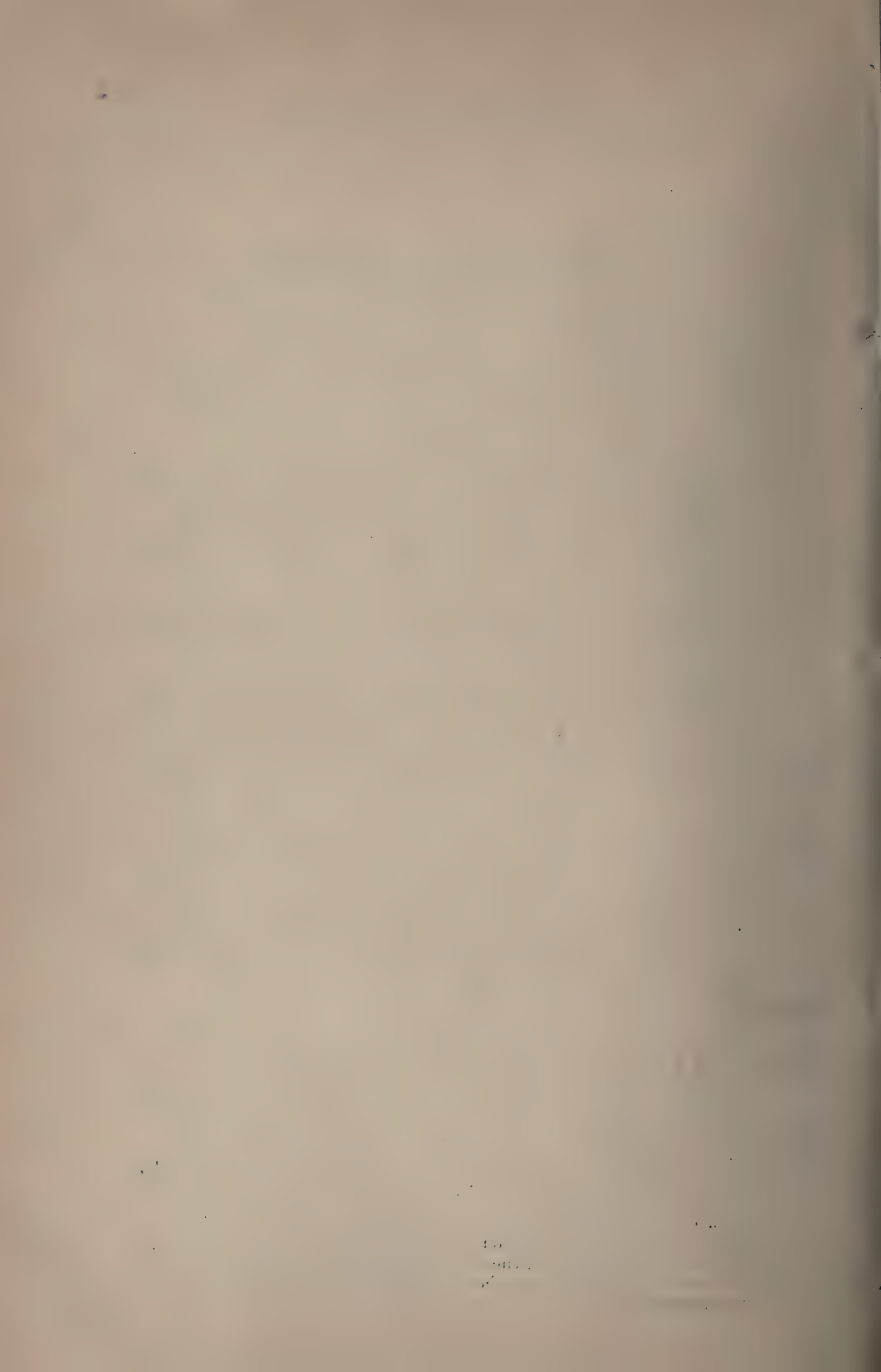
Sessions Judge.—*Criminal Procedure Code*, 1882, *Sections* 30, 35, 337, 380—*Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge—Appeal by accused to Sessions Judge—Procedure—District Magistrate at whose instance pardon was tendered to approvers trying case himself—Penal Code, Section* 395.—See *Appeal in Criminal Cases*, No. 1.

Subordination of Criminal Courts.—See *Criminal Courts, Subordination of*—

W.

Warrant.—Act XIII of 1859—*Criminal Procedure Code*, 1898, *Sections* 5, 83—*Execution of warrants issued under Act XIII of 1859.*—See *Criminal Procedure Code*, 1898, *Section* 5.

Witnesses for defence, Refusal of Magistrate to summon.—*Practice—Refusal of District Magistrate to summon witnesses for defence without expenses being paid by accused.*—An order by a District Magistrate refusing to summon witnesses for the defence without their expenses being paid by the accused, although legal, should be passed very sparingly, and is an improper order in a case where the accused is unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, especially if the case is not in which a severe sentence is inflicted



INDEX OF NAMES (CRIMINAL).

The references are to the Nos. given in the "Record."

	No.
A.	
Ajmal Shah v. Queen-Empress	2
B.	
Bure Khan v. Queen-Empress	16
G.	
Ghassi v. Queen-Empress	13
Gobind Ram v. Queen-Empress	18
J.	
Jat Singh v. Queen-Empress	10
Jiwan v. Queen-Empress	5
K.	
Karam Din v. Queen-Empress	14
L.	
Lajje Ram v. Queen-Empress	12
M.	
Moula Bakhsh v. Queen-Empress	6
Mussammat Taban v. Queen-Empress	1
Q.	
Qadu v. Queen-Empress	7
Queen-Empress v. Batera	3
" v. Chetu	11
" v. Khushal Singh	15
" v. Saif Ali	17
" v. Zaharia	9
S.	
Sojan Singh v. Faujdar Singh	8
Sukha v. Queen-Empress	4

Chief Court of the Punjab.

CRIMINAL JUDGMENTS.

No. 1.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Reid.

MUSSAMMAT TABAN,—(ACCUSED)—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Case No. 2389 of 1897.

Criminal Procedure Code, 1882, Sections 337, 339, 436, 537—Tender of pardon to accomplice—Sessions Judge withdrawing pardon and committing accomplice for trial—Authority of Magistrate to tender pardon.

Two women were suspected of the murder of one K. S., and it appeared from the record that a Magistrate of the 1st class tendered a pardon (which was accepted) to one of them, Mussammat T., before the case was *chalaned* to him by the Police, and committed the other, Mussammat D., to the Sessions Court for trial on a charge of murder. Mussammat T. gave evidence as a witness against Mussammat D., both before the committing Magistrate and in the Court of Sessions. The Sessions Judge, in acquitting Mussammat D., directed the withdrawal of Mussammat T.'s pardon, which he also found to have been given without proper authority, and her commitment for trial on a charge of murder. Mussammat T. applied to the Chief Court to set this order aside.

Held, that the order of the Sessions Judge must be regarded as one under Section 436 of the Criminal Procedure Code, for, although there had as yet been no formal discharge of Mussammat T., yet, as she had been ordered to be placed on bail by the Magistrate as required by Section 337 of the Code, she must be regarded as an accused person till the close of the trial of Mussammat D., when there would necessarily be either a formal order for her discharge or for her commitment for trial, and it was then competent for the Sessions Judge, if he thought proper to direct, under Section 436, her commitment without waiting for a Magistrate to formally, and in the opinion of the Sessions Judge improperly, discharge her.

Section 339, Criminal Procedure Code, makes no provision for the mode in which a pardon is to be withdrawn, and the Magistrate or Court who could have placed the person accepting the pardon on his trial in the first instance, is competent to do so notwithstanding the pardon, if such Magistrate or Court considers that the conditions of the pardon have not been fulfilled. When the person holding the pardon is placed on his trial, he will first plead his pardon, and if he proves that it was

in fact granted, he will be entitled to an acquittal unless the prosecution proves that (1) the accused has wilfully concealed material facts, or (2) has given false evidence.

When a pardon has been tendered and accepted in good faith, the fact that the Magistrate had no power to tender such pardon is a defect expressly cured by Section 537 of the Code.

Petition for revision of the order of Kazi Muhammad Aslam O.M.G., Sessions Judge, Lahore Division, dated 18th August 1897.

The judgment of the Court was delivered by

21st Jany. 1898.

ROE, C. J.—From the order of the Sessions Judge it appears that two women, Mussammat Dewan and Mussammat Taban, were suspected of the murder of one Kharak Singh by administering to him arsenic; that a pardon was tendered to and accepted by Mussammat Taban under Section 337, Criminal Procedure Code, and she gave evidence as a witness against Mussammat Dewan both before the committing Magistrate and in the Court of Sessions. The Sessions Judge, in acquitting Mussammat Dewan, has directed the withdrawal of Mussammat Taban's pardon, which he also finds to have been given without proper authority, and her commitment for trial on a charge of murder. Mussammat Taban applies to this Court to set aside this order.

We think that the order of the Sessions Judge should be looked on as one under Section 436, Criminal Procedure Code,—that is as one ordering the commitment of a person who has been improperly discharged by a Magistrate. It is true that there has as yet been no formal discharge of Mussammat Taban, but she was ordered to be placed on bail by the Magistrate as required by Section 337, Criminal Procedure Code, and she must be regarded as in the position of an accused person down to the conclusion of the trial of Mussammat Dewan. At the close of that trial, there would necessarily be either a formal order for her discharge or for her commitment for trial. And it appears to us that if the Sessions Judge thought she ought to be committed for trial, he could, under Section 436, Criminal Procedure Code, have directed this without waiting for a Magistrate to formally, and in the opinion of the Sessions Judge improperly, discharge her.

Section 339 makes no provision for the mode in which a pardon is to be withdrawn, and the reason no doubt is that no special provision is necessary. The Magistrate or Court who could have placed the person accepting the pardon on his

trial in the first instance is competent to do so notwithstanding the pardon, if the Magistrate or Court considers that the conditions of the pardon have not been fulfilled. When the person holding the pardon is placed on his trial, he will first plead his pardon. If he proves that it was in fact granted, then the prosecution will have to show that (1) the accused has wilfully concealed material facts, or (2) given false evidence. If the prosecution fails to do this, the accused would be entitled to an acquittal.

We think we should be justified in interfering on Revision with an order directing the trial of an accused person holding a pardon if there is no good *prima facie* proof that the conditions of the pardon have been broken.

In the present case we may first briefly dispose of the objection put forward by the Sessions Judge that the pardon itself was irregular, as Mr. Abbott, the Magistrate who granted it, had no power to do so. Mr. Abbott was a Magistrate of the first class in charge of the Kasur Sub-Division, and he eventually committed the case for trial. It is true that he tendered the pardon before the case was "chalaned" to him by the Police, and it does not appear that he was specially authorized by the District Magistrate to tender the pardon. It is probable that Mr. Abbott was enquiring into the case before it was "chalaned" to him by the Police (see *Punjab Record* No. 3 of 1877, Criminal), but it is not necessary for us to enquire further into the facts, as there can be no doubt that the pardon was tendered and accepted in good faith, and even if Mr. Abbott had no power to make the tender, the defect is expressly cured by Section 537, Criminal Procedure Code.

As to whether there is *prima facie* proof that Mussammat Taban has (1) wilfully kept back the truth, or (2) given false evidence, the finding of the Sessions Judge apparently is not that she has wilfully concealed anything, but that she has given false evidence by stating that Bahadar was present when she and Mussammat Dewan were grinding and mixing the arsenic, whereas she originally stated only that he was present when Mussammat Dewan gave the "khir" to Kharak Singh. The Sessions Judge considers that the addition was made in order to strengthen the case against Mussammat Dewan. This may be so, but the Sessions Judge is mistaken in saying that there is a discrepancy between her own and Bahadar's statements on the point before the committing Magistrate and at the trial. The record shows that on both occasions both

Mussammat Taban and Bahadar stated that the latter was present at the mixing or kneading. The statement may very probably be false, and the fact that it was not made in an original statement to the Police, or elsewhere, would be a good reason for distrusting it. But it certainly cannot be said that there is actual proof that it is false. And even if it were proved, we should hesitate to allow the accused to be placed on her trial for murder merely because she had at the instigation of the Police made a slight addition to her first statement, in order to strengthen the case for the prosecution.

We, therefore, set aside the order directing that Mussammat Taban be committed for trial and order her discharge.

Application allowed.

No. 2.

Before Mr. Justice Frizelle.

AJMAL SHAH,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 2779 of 1897.

REVISION SIDE. }

Criminal Procedure Code, 1882, Section 110—Security for good behaviour—General reputation—

For a man to have a bad general reputation it is not necessary that there should be no one to give him a good character, but it is necessary that the evidence should be so strong as to leave no doubt what a man's general repute is. When, therefore, as good witnesses come forward to state that a man's reputation is good as those who state the contrary, it cannot be said that his reputation is bad, unless there is something to corroborate the witnesses against him.

No. 2, *Punjab Record*, 1897, Criminal, explained.

Petition for revision of the order of Captain P. S. M. Burlton, District Magistrate, Jhang, dated 8th September 1897.

Oertel, for petitioner.

Sinclair, Government Advocate, for respondent.

The judgment of the learned Judge was as follows:—

5th Feby. 1898.

FRIZELLE, J.—I think I cannot help revising the order in this case and Alam Sher's. Petitioner has been found to be an habitual receiver of stolen property on evidence of general repute. On considering that evidence and the evidence for the defence, I do not think that it is proved that he is by general repute an habitual receiver of stolen property. There is, in my opinion, far better evidence that this is not his reputation than that it is. The evidence against him is

largely that of persons admitted to be his enemies. The chief witnesses against him now were the chief witnesses against him when he was charged with being an habitual offender and acquitted in 1896. He was acquitted then on the ground that the case was got up by his enemies, and that he was proved to be a man of good character. A perusal of that judgment is sufficient to show that it was a very proper one, and I do not think anything but fresh facts coming to light, or good proof of subsequent crime being attributed to him, would justify the requisition of security so soon after that order. A great many witnesses have been called to prove that he bears a good reputation. For a man to have a bad general reputation, of course it is not necessary that there should be no one to give him a good character, and this was not the meaning of *Punjab Record* No. 2 of 1897. But it is necessary that the evidence should be so strong as to leave no doubt what a man's general repute is. When as good witnesses come forward to state that a man's reputation is good as those who state the contrary, it can hardly safely be held that that man's general reputation is bad, unless there is something to corroborate the evidence of the witnesses against him.

In the present case, I think, the witnesses for the defence are more trustworthy than those for the prosecution, as several of the latter are proved to be influenced by enmity, while the former include many respectable persons whose evidence I do not see equal reason for distrusting.

It is admitted that petitioner (Ajmal Shah) has never been convicted of any offence, and that no stolen property has ever been found with him. This alone is sufficient to throw doubt on the evidence of his being an habitual offender. The only thing against him is that security was taken from him in 1884, and again in 1890, and it should be assumed that it was rightly taken from him; but this is quite insufficient to prove that he is now an habitual offender. I neither believe that he is proved to be at present an habitual receiver of stolen property, nor that he bears the general repute of being such.

As to Alam Sher, the case is very much the same. Only it is on the whole weaker. He also has never been convicted or found in possession of stolen property, and he has never been required to give security. He is a near relation of Ajmal Shah, and there is every reason to fear that he has been prosecuted merely in consequence of that relationship. I accept both petitions and discharge petitioners from their security.

Application allowed.

No. 3.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Stogdon.

QUEEN-EMPRESS,

Versus

BATERA AND OTHERS,—(ACCUSED).

Case No. 2838 of 1897.

Criminal Procedure Code, 1882, Sections 30, 35, 337, 380—Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge—Appeal by accused to Sessions Judge—Procedure—District Magistrate at whose instance pardon was tendered to approvers trying case himself—Penal Code, Section 395.

The District Magistrate of Gurgaon, with enhanced powers under Section 30 of the Criminal Procedure Code, charged certain persons with three separate offences of dacoity, and tried them for the same at one trial. He convicted four of the accused, and passed on them aggregate sentences of 5, 7, 7 and 5 years, respectively, but overlooked the fact that, under Section 35 of the Code, such sentences were single sentences requiring confirmation of the Sessions Judge, and did not submit them for confirmation. The accused appealed to the Sessions Judge, who submitted the files to the Chief Court, with a recommendation that the convictions should be quashed on the revision side, and the District Magistrate directed to commit the accused to the Sessions. The principal ground for the recommendation was that the District Magistrate, having tendered a pardon to two approvers, and having examined them, was, by the last paragraph of Section 337 of the Code, incapacitated from trying the case himself. It appeared that the pardons were tendered to the approvers by a Magistrate of the 1st class at the instance, or with the sanction, of the District Magistrate, and that the approvers were examined by the former Magistrate, and were subsequently examined by the District Magistrate in the course of the trial.

Held, that the omission by the District Magistrate to duly submit the sentences for confirmation could not operate to change the course of appeal, and that the Sessions Judge, on having the cases brought to his notice through the medium of an appeal, should have proceeded to exercise his confirmatory jurisdiction under Section 380 of the Code, whereupon the appeals would have lain to the Chief Court under Section 408.

Held further, that the provisions of Section 337 of the Code must be construed strictly, and that the disqualification created by the last paragraph applies only to that Magistrate before whom the suspected person is brought face to face, and who attempts to induce him by promise of pardon to make a full and true disclosure, the examination referred to in the said paragraph being the one made on the tender of the pardon and directly resulting from it, and not the examination of the approvers in the course of the trial.

REVISION SIDE. }

*Case submitted for orders by S. Clifford, Esquire, Sessions Judge,
Delhi Division.*

Sinclair, Government Advocate, for respondent.

The order of the Court was as follows:—

STODDON, J.—The Magistrate of the Gurgaon District, 14th Feby. 1898. with enhanced powers under Section 30, Criminal Procedure Code, charged Batera, Kauda, Mirza, Sukhram, Alfu, Shitabi and Nanga with three separate offences of dacoity at (1) Piao Kasauli, (2) Danwapur, and (3) Sultanpur, under Section 395, Indian Penal Code, and tried them for the same at one trial. He passed upon Batera, Kauda, Mirza and Alfu aggregate sentences of 5, 7, 7 and 5 years, respectively, but overlooked the fact that under Section 35, Criminal Procedure Code, such sentences were single sentences requiring confirmation of the Sessions Judge, and did not submit them for confirmation. The convicts appealed to the Sessions Judge, who submitted the files to this Court with a recommendation that the convictions should be quashed on the revision side, and the District Magistrate directed to commit the accused to the Sessions. The principal ground for the recommendation is that the District Magistrate having tendered a pardon to Har Chand and Hamida, and having examined them, was, by the last paragraph of Section 337, Criminal Procedure Code, incapacitated from trying the case himself. It was contended before the Sessions Judge that the appeals all lay to his Court, because the District Magistrate did not pass the sentences subject to its confirmation, and the accused were undergoing imprisonment under his sentences, but an omission on the part of the District Magistrate to comply with the clear provisions of the law and to submit the sentences for confirmation cannot operate to change the course of appeal. We consider that the Sessions Judge, on having the cases brought to his notice through the medium of an appeal, should have proceeded to exercise his confirmatory jurisdiction under Section 380, Criminal Procedure Code. All appeals in the case would then have lain to this Court under the provisions of Section 408, but, as matters stand, they cannot be presented because the case has not been disposed of by the Court of Session.

It appears that pardons were tendered to Har Chand and Hamida by Rai Lachhman Das, a 1st class Magistrate, at the instance, or as the Magistrate expresses it, with the sanction, of the District Magistrate, and that they were examined by Rai Lachhman Das. We think that the provisions of

Section 337, Criminal Procedure Code, must be construed strictly, and that the disqualification created by the last paragraph applies only to that Magistrate before whom the suspected person is brought face to face, and who attempts to induce him by promise of pardon to make a full and true disclosure. Such Magistrate to a certain extent assumes the functions of a police officer, and identifies himself with the prosecution, and it was doubtless on that account that it was considered proper to disqualify him from trying the case. As regards the examination, we think that a distinction may be drawn between the examination made by the pardon-tendering Magistrate, which is equivalent to a police examination, and that made by the Magistrate trying the case, and we do not think that the examination of the approvers made by the District Magistrate in the course of the trial is one of the nature referred to in the last para. of Section 337. That examination appears to be the one made on the tender of pardon, and directly resulting from it.

For the above reasons we cannot accede to the recommendation of the Sessions Judge, and we return the cases to him, and request that he will dispose of such sentences as require confirmation under Section 380, Criminal Procedure Code, and thereafter submit the appeals for the orders of this Court. This order governs also the trial of the Burhia Kamalpur and Main Batauri dacoity cases (Chalan No. 2), in which sentences requiring confirmation were passed on Alfn and Batera.

In the Chainawali case (Chalan No. 3) the appeal lies to the Sessions Judge, who must dispose of it.

No. 4.

Before Mr Justice Stogdon and Mr Justice Reid.

SUKHA,—(ACCUSED),—PETITIONER.

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Case No. 1722 of 1897.

Criminal Procedure Code, 1832, Section 110—Security for good behaviour—General repute—Evidence—Personal knowledge of Magistrate.

Accused, who was a lambardar of Kalian in the Chiniot *tahsil*, was ordered by the Magistrate to execute a bond for Rs. 1,000, with two sureties, for his good behaviour for a period of three years. It appeared that twenty-one persons gave evidence to the effect that accused was a habitual receiver of stolen property, while thirty-eight persons testified that he was by general repute a man of unblemished character. The order of the Magistrate was confirmed on appeal by the District Magistrate, who concluded his judgment by stating that he personally knew the accused to be a well-known receiver of stolen property, knowing it to be stolen. The accused applied to the Chief Court on the revision side.

Held, that the burden of proving an accused's bad character lies on the prosecution, and that, therefore, when the evidence on both sides is, as the Court found to be in the present case, of an indifferent and interested character, the prosecution must fail.

Evidence as a rule should be tested by its quality rather than by its quantity.

Held, further, that the case should have been decided solely on evidence taken in Court, and that the District Magistrate was not entitled to rely on his own personal knowledge.

The law regarding security for good behaviour is a hard law, which can easily be used as an instrument of oppression, and should not, therefore, be enforced except on the best possible grounds. It is incumbent on Magistrates in such cases to exercise the greatest caution and impartiality, and to be careful not to be influenced by outside gossip and vague rumour.

*Petition for revision of the order of Captain P. S. M. Burlton.**District Magistrate, Jhang, dated 4th May 1897.*

Muhammad Shafi, for petitioner.

Robinson, Junior Government Advocate, for respondent.

The judgment of the Court was delivered by

STODDON, J.—On the 23rd March last Lala Tikkan Lal, a 1st class Magistrate in the Jhang District, required Sukha, caste Haral, lambardar of Kalian in the Chiniot *tahsil*, to execute a bond for Rs. 1,000, with two sureties, for his good behaviour for a period of three years. This order was confirmed 28th Feby. 1898.

by the District Magistrate on appeal. Sukha has applied to this Court on the Revision Side to set it aside.

The Magistrate found that "overwhelming evidence has been produced against him to the effect that he is an habitual receiver of stolen property and disposes of it in the adjoining districts of Gujranwala, Montgomery and Shahpur, and the stolen property of those districts passes through his hands and is disposed of in this and other districts. It is not proved that he himself commits thefts, but it is sufficiently proved that he is a big *rassagir*, and through his relatives Bagga, Muhammad, Muhabbata and others she gets cattle lifted, and through him the stolen property passes to the adjoining districts."

Twenty-one witnesses were examined for the prosecution and thirty-eight for the defence. It appears that in 1896, Syed Jalal resigned, the *zaildari* of Kot Khuda Yar and accused along with others applied for the appointment. Saleh Shah, son of Syed Jalal, obtained it, but accused's action in opposing him is said to have offended him and other influential Syeds, who on that account gave evidence that he was a man of bad character. The judgment of the Magistrate shows that he did not place much reliance on their evidence, but he considered that without it there was sufficient and overwhelming evidence which proved beyond doubt that accused was a "big *rassagir*." He disposed of the evidence for the defence with a remark that it was not difficult for accused and his brother Shujawala, *zaildar*, to produce any number of witnesses or headmen and make them say anything they chose. The District Magistrate apparently believed the evidence for the prosecution, for he recorded that the plea of enmity cuts both ways, that a disinterested witness is an unknown quantity in this country, and that he did not consider that any Court was justified in rejecting evidence on that ground alone. He, however, proceeded to reject the whole of the evidence for the defence on that ground, for it was, he said, such, as men in accused's position could always produce, *i.e.*, it was not disinterested. He accounted for accused's former immunity from prosecution on the ground of his influence and position and the supineness of the authorities, and concluded his judgment by stating that he personally knew the accused to be a well-known receiver of stolen property, knowing it to be stolen.

The prosecution witnesses may be divided into three groups, *vis.* :—(1) officials, (2) Syeds, (3) others. The officials

witnesses are Nos. 1, 9, 16, 17, 18, 19, 20 and 21. The Syeds are Nos. 2, 3, 11, 13, 14 and 15. The others are Nos. 4, 5, 6, 7, 8, 10 and 12. The Magistrate attached little or no weight to the evidence of the Syeds, because they were undoubtedly actuated by inimical motives. Of the others Nos. 5, 6 and 8 are enemies of accused and No. 10 is a friend of Syed Jalal. There remain the official witnesses and Nos. 4, 7 and 12. Of the official witnesses the most important are No. 9 Ahmed Khan, Deputy Inspector of Chiniot, No. 19 Mihr Singh, Sergeant, stationed at Chiniot, and No. 21 Wariam Khan, Tracker Sergeant, also stationed at Chiniot. Ahmed Khan had, however, to admit that he had been in charge of the Chiniot police station for a short time only, so his evidence was not of much value. The evidence of No. 16 Sheikh Amirud-din, Tahsildar of Chiniot, was worth little or nothing. He said that during the course of the *zuldari* case he had made enquiries regarding accused's character and that the result was unfavourable to him, but whether he inquired solely from accused's enemies does not appear. The evidence of other police officers who are stationed in other police stations and who never received any complaints against accused, is obviously of little weight. The most important evidence is, perhaps, that of witnesses who state that they lost cattle, suspected accused's relatives or servants of having stolen them and went to accused who demanded money, which they never paid, and made promises of restoration, which he never kept. None of them ever reported their losses to the police, except perhaps Mir Dad No. 12, who said that he lost two buffaloes and petitioned the District Magistrate about them, but did not appear to prosecute his petition, because the accused promised to restore them. Considering accused's position and influence, the probability is that he was often asked to assist in the recovery of cattle, either stolen or strayed. It is possible that he may have demanded money for his services, but a few isolated causes of this kind are not sufficient to prove that he is an habitual receiver of stolen property. Of his witnesses seventeen are *lahardars* and seven Hindu shop-keepers and money-lenders. Possibly many of them know little or nothing about him and gave evidence merely because he asked them to oblige him, but the burden of proving accused's bad character was on the prosecution, and it can hardly be maintained that the charge against him was established by the evidence of interested officials, inimical Syeds and disappointed owners of stolen cattle. If it be assumed that the whole of the witnesses for

the prosecution and defence are disinterested, then the conviction can hardly be maintained, for twenty-one persons say that accused is by general repute a receiver of stolen property, while thirty-eight say that he is by general repute a man of unblemished character. Evidence should as a rule be tested by its quality rather than by its quantity. In the present case the quality on both sides appears to be indifferent and the prosecution must therefore fail. Assuming that the quality on both sides is good, it must also fail, because the evidence for the defence altogether outweighs that for the prosecution. The case is one which must be decided on evidence taken in Court just like all other criminal cases, and the District Magistrate was not entitled to rely on his own personal knowledge. It has several times been pointed out by this Court that the law regarding security for good behaviour is a hard law, which can easily be used as an instrument of oppression, and which should not be enforced except on the best possible grounds. It is to be feared that it is often resorted to as a means of ensuring the punishment of persons suspected, but not proved to have committed offences such as thefts, house-breaking, &c., and it is notorious that accusations of bad livelihood are constantly made, merely with the object of blackening an enemy's character and of satisfying feelings of spite and hatred. Under such circumstances it is incumbent on Magistrates to exercise the greatest caution and impartiality, and to be careful not to be influenced by outside gossip and vague rumour. The judgments of the Magistrates in this case are of such a nature as to give rise to a suspicion that they did not approach the decision of the case with entirely unprejudiced minds.

As we do not consider that the order demanding security was justified, we set it aside.

No. 5.

Before Mr. Justice Chatterji.

JIWAN,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Case No. 366 of 1898.

Gambling Act, 1867. Sections 8, 11—Confiscation of property belonging to person acquitted on trial.

The words "on conviction" in Section 8 of the Gambling Act, 1867, are intended to confer jurisdiction to order forfeiture only in cases where there is a conviction, and clearly mean that it cannot be exercised where there is no conviction. Nor, even where there is a conviction, is the power to order forfeiture unlimited, such power being necessarily restricted to property belonging to convicted persons, and not extending to property belonging to persons sent up for trial but acquitted under Section 11 of the Act.

Petition for revision of the order of Sardar Charat Singh, Magistrate, 1st class, Sialkot, dated 11th December 1897.

The following judgment was delivered by

CHATTERJI, J.—The petitioner was one of the persons sent up for trial by the Police under the Gambling Act, 1867, but was at their recommendation examined as a witness. The Magistrate believed that he made a true and faithful discovery to the best of his knowledge of all matters as to which he was examined. Under Section 11 of the Act, on which the Magistrate acted, petitioner was entitled to a certificate in writing to the above effect from him, and to be indemnified against all prosecution under the Act for anything done up to that time. The Magistrate, however, recorded an order of acquittal.

15th April 1898.

The Magistrate passed an order of confiscation of all property seized by the Police when they made their raid on the gaming-house. A gold and a silver ring, a small knife and a *Nanak Shahi* copper coin were recovered from the person of the petitioner during the search, and the present application is for setting aside the order of confiscation with respect to them.

Section 8 of the Gambling Act empowers the Magistrate, on the conviction of any person for keeping or using any common gaming-house within the meaning of the Act, or being present therein for the purpose of gaming, to order all the instruments of gaming found therein to be destroyed, and also

to order all or any of the securities for money, or other articles seized, not being instruments of gaming, to be sold and converted into money, and the proceeds thereof with all monies seized to be forfeited, or, in his discretion, to order any part thereof to be returned to the persons entitled to the same.

The section is somewhat widely worded, but I cannot read it as laying down that, in the case of a conviction as specified, all money or other articles seized by the Police may be confiscated by the Magistrate, or in other words that the order of confiscation may be passed as regards the property of a person who is sent us for trial, but is found to have been innocently present at the common gaming-house, and is acquitted on that ground. A penal statute must be construed with reasonable strictness according to the true intent of the legislature, so that "no cases shall be held to fall within it, which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment." *Maxwell Interpretation of Statutes*, 3rd Edition, 369; *Hardcastle*, 2nd Edition, 479. The words "on conviction" are evidently intended to confer jurisdiction to order forfeiture only in cases where there is a conviction, and clearly mean that it cannot be exercised where there is no conviction. They have the effect therefore of limiting the jurisdiction to such cases, and it would be repugnant to their scope to hold that, where there is a conviction, the power to order forfeiture is unlimited. In the absence of express words to this effect, such an interpretation cannot be accepted. The power is thus necessarily restricted to property belonging to convicted persons.

The petitioner was acquitted by the Magistrate, and he must, for the purposes of the section, be assumed to have been innocently present at the gaming-house. Strictly speaking, he ought to have got a certificate indemnifying him against all prosecution for anything done by him in respect of the gaming for which he was arrested, but I think this would have included an indemnity against his property being forfeited, which is one of the penalties imposed by the Gambling Act against those who infringe its provisions.

The Magistrate probably omitted to pass an order respecting the petitioner's property owing to an oversight.

I accept the application and order the petitioner's property or its equivalent, if it has been sold, to be restored to him.

Application allowed.

No. 6.

Before Mr. Justice Reid and Mr. Justice Clark.

MOULA BAKHSH,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Case No. 319 of 1898.

*Criminal appeal—Duty of Appellate Court to consider facts of case—
Doubts entertained by Appellate Court.*

Though in criminal cases an Appellate Court should be guided in its estimate of the evidence of a witness by remarks recorded by the first Court, under Section 363, Criminal Procedure Code, as to the demeanour of that witness, such Appellate Court is bound to independently consider the facts of the case, and the prisoner is entitled to the benefit of reasonable doubt in the appellate no less than in the first Court.

Where, therefore, the Sessions Judge admitted that he was "perplexed by the difficulties and incongruities of the case," but upheld the conviction on the ground that an Appellate Court should not interfere with the finding of the first Court unless clearly convinced that it was erroneous, *held*, that the judgment of the Sessions Judge must be set aside, and the appeal heard *de novo*.

The Chief Court, therefore, transferred the appeal, under Section 526 of the Criminal Procedure Code, to itself for trial, and, after hearing counsel on the facts, reversed the conviction of the accused.

Petition for revision of the order of G. L. Smith, Esquire, Sessions Judge, Rawalpindi Division, dated 1st February 1898.

Muhammad Shah Din, for petitioner.

Robinson, Junior Government Advocate, for respondent.

The judgment of the Court was delivered by

REID, J.—This case and Criminal Revision 401 of 1898 *7th May 1898.* involve the same points, and will be disposed of together.

For the petitioners it is contended that the learned Sessions Judge has declined to decide the case himself, and has simply accepted the finding of the convicting Magistrate.

After setting out seven of "the most remarkable im-
"probabilities" in the case for the prosecution, and three
"improbabilities" in the case for the defence, the learned
Judge continues "I do not propose to discuss these difficulties
"in detail. It would serve no good purpose. Some explana-
"tion might no doubt be found to minimise some of them, but
"it is obvious that at the best they must still remain a
"formidable array. It is difficult to choose between the two
"sets, as to which is the least insurmountable, but I think

“that, for choice, those militating against the case for the prosecution are the least so.”

“Another reason, and the chief one, for my deciding in favour of the prosecution, is that the Magistrate, who tried the case, (and who is the best Judge of value of the evidence) decided against the accused, and this Court should not interfere with its finding, unless this Court is clearly convinced that the Magistrate’s finding is erroneous, which this Court (however perplexed by the difficulties and incongruities of the case) certainly is not (*I. L. R., V All.*, 386). This course is the more proper in the present case, because the Magistrate was particularly influenced in his decision by the demeanour of the complainant and other witnesses, and the Magistrate was, of course, the best or rather the only Judge of that.”

“The appeals are dismissed.”

The rule laid down in *Empress v. Sajiwan Lal*, *I. L. R., V All.*, 386, relied on by the learned Judge runs thus, “An appellant is not precisely in the same position, before an Appellate Court, as he is before the Court trying him, but must satisfy the Court that there is sufficient ground for interfering with the order of conviction, and, if no sufficient ground is shown, it is the duty of the Appellate Court not to interfere.”

If this means that a Court of Criminal Appeal is not to weigh the evidence on the record for itself, and form its own conclusions thereon, it is obviously wrong.

The Appellate Court should doubtless be guided in its estimate of the evidence of a witness by remarks recorded by the first Court under Section 363 of the Code of Criminal Procedure, as to the demeanour of that witness inasmuch as those remarks form part of the evidence on the record, and arguments used by the first Court frequently assist in dispelling doubts which the Appellate Court may entertain, on first considering the evidence, but there is ample authority for holding that the prisoner is entitled to the benefit of reasonable doubt in the Appellate Court as in the original Court, and as remarked by Mitter, J., in *Queen v. Goomance and others*, *XVII, W. R. (Criminal)* 59, “the Appellate Court must weigh the evidence extrinsically as well as intrinsically.” In *Kheraj Mullah v. Janab Mullah*, *XX W. R. (Criminal)* 13, Kemp and Phear, JJ., say : “On reading the Sessions Judge’s judgment

“it seems pretty clear that he was unable, even with the aid
“of the Magistrate’s finding of fact to form an independent
“judgment as to whether the prisoners had committed the
“offence or not. That being so, it was his duty to have
“acquitted them.”

In *Protab Chundar Mukerji v. Empress*, XI, C. L. R., 25, White, J., says: “The sound rule to apply in trying a criminal appeal, where questions of disputed fact are in issue, is to consider whether the conviction is right, and in this respect a criminal appeal differs from a civil one. There the Court must be convinced before reversing a finding of fact by a lower Court that the finding is wrong.”

The same rule is laid down by a Division Bench in *Milan Khan v. Saghai Bepari*, I. L. R., XXIII Cal., 347, where the lower Appellate Court had said: “I am not quite sure whether I should have arrived at the same conclusion, but nothing has been urged before me which justifies me in upsetting the finding on the question of fact.”

Their Lordships say: “If the Judge of the Appellate Court had any doubt that the conviction was a right one, and had any doubt as to whether the offence charged had been committed, whatever the original Court did, he should have discharged the accused.”

In *Punjab Record* (Criminal), 1876, the rule is laid down that the law of appeal constitutes the Appellate Court Judge of the facts, just as completely as the Court of first instance.

This being the law, as we understand it, we have no doubt that the learned Sessions Judge should have given the petitioners the benefit of the doubt, which he obviously entertained, and should have acquitted them.

It is further contended by the learned counsel for the petitioners that the only course open to us, sitting as a Court of Revision, is to do what the lower Appellate Court should have done, and acquit the petitioners. To adopt this course would be to adopt the doubt entertained by the lower Appellate Court, although we might possibly entertain no such doubt ourselves. As a Court of Revision we can do anything which an Appellate Court might do, under Sections 423 and 428 of the Code of Criminal Procedure, including ordering a re-trial or ordering additional evidence to be taken. It is true that, in the four cases last quoted, the Courts do not appear to have considered the evidence on the record, as Courts of

appeal, but in *XXIII Cal.*, their Lordships say, before acquitting the petitioner: "We think that no possible gain "can be derived by sending the case back. The Magistrate "has expressed his own doubt as to whether the evidence is "sufficient for a conviction. That this is not really a "case where public justice requires any further proceedings, "adds to our reasons for not directing a re-trial." To adopt doubts entertained by a lower Appellate Court would, in our opinion, not infrequently cause a miscarriage of justice. The question now raised does not appear to have been raised in the cases quoted, and we hold that the judgment of the learned Sessions Judge must be set aside and that the appeal must be tried *de novo*.

Under Section 526 of the Code we have power to transfer an appeal to this Court for trial, and as it was, in our opinion, expedient that the appeal from the conviction by the Court of first instance should be tried by us, we have heard counsel on the facts. The conclusion at which we have arrived is that the improbabilities in the case for the prosecution, specified in the appellate judgment, exist, and have not been satisfactorily explained.

They raise such serious doubts as to the correctness of the conviction that we cannot maintain it.

It is quite possible that the complainant was cheated by some or all of the petitioners, but we cannot accept his evidence and the evidence of his witnesses as disclosing the facts.

One or two of the improbabilities specified might have been explained, but the concurrence of so many raises an insurmountable obstacle to our accepting the story for the prosecution.

The conduct attributed to himself by the complainant is almost incredible in a man of business, and the terms of the bond and the evidence of its marginal witnesses flatly contradict him.

We set aside the conviction and sentences and order the fines, if realized, to be refunded.

No. 7.

Before Mr. Justice Frizelle, Chief Judge.

QADU,—(ACCUSED),—APPELLANT,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 232 of 1898.

Practice—Refusal of District Magistrate to summon witnesses for defence without expenses being paid by accused.

An order by a District Magistrate refusing to summon witnesses for the defence without their expenses being paid by the accused, although legal, should be passed very sparingly, and is an improper order in a case where the accused is unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, especially if the case is one in which a severe sentence is inflicted.

Appeal from the order of J. G. M. Rennie, Esquire, District Magistrate, Mooltan District, dated 25th October 1897.

The judgment of the learned Chief Judge was as follows :

FRIZELLE, C. J.—This is the second case that has come before me within the last two days in which the District Magistrate of Mooltan has refused to summon witnesses for the defence without their expenses being paid by the accused. In the previous case I ordered the witnesses to be summoned at the expense of Government, and will pass the same order in this case. Although the order of the District Magistrate was legal, it is an order that should be passed very sparingly. It may be a proper order in a case in which the accused does not refuse to deposit the expenses and the witnesses are accordingly summoned and their evidence taken, but not in a case in which he may be unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, especially if the case is one in which a severe sentence is inflicted, as in the present case (an aggregate sentence of 9 years' rigorous imprisonment). I now direct that the District Magistrate take the evidence of appellant's witnesses and forward it to this Court.

13th June 1898.

No. 8.

Before Mr. Justice Reid.

SOJAN SINGH AND OTHERS,—(ACCUSED),—

PETITIONERS,

Versus

FAUJDAR SINGH AND OTHERS,—RESPONDENTS.

Case No. 1056 of 1898.

Penal Code, Section 194—Sanction for prosecution.

Where an application is made for sanction for prosecution for an offence punishable under Section 194 of the Penal Code, either the

} APPELLATE SIDE.

} REVISION SIDE.

application or the sanction should indicate to the person to be prosecuted what story or statement is alleged to be false.

Petition for revision of the order of H. Scott Smith, Esquire, Additional Sessions Judge, Ferozepore Division, dated 16th April 1898.

The judgment of the learned Judge in Chambers was as follows :—

6th July 1898.

REID, J.—The sanction for prosecution for an offence punishable under Section 194 of the Penal Code is far too vague, and this defect is not remedied by the application for sanction, which contains no particulars of the assignments of perjury.

Either the application or sanction should indicate to the person to be prosecuted what story or statement is alleged to be false.

This is clearly laid down by Straight, J., in *Har Dial*, I. L. R., VI All., 105, by Edge, C. J., in *Balwant Singh v. Umed Singh*, I. L. R., XVIII All., 203, and by Jardine, J., in *Jiwan Das*, I. L. R., XIX Bom., 362. The last named Judge said: "In the present case the sanction relates to the giving of false evidence in a long deposition, but not the very slightest indication is given in the proceedings as to what story or statement was, in the opinion of the Sessions Judge, false."

Edge, C. J., ruled that the assignments of perjury, for which sanction to prosecute was asked, should be distinctly stated in the application, and that it should not be left to the Court which is asked to grant the sanction, or to the Court which is to act on that sanction, to find out from another record, in a case of alleged forgery, what the document is in respect of which sanction is sought or required. I set aside the order granting sanction. The applicants for sanction can, if so advised, move the Court of Session by an application drawn up in due form.

Application allowed.

No. 9.

Before Mr. Justice Stogdon and Mr. Justice Chatterji.

QUEEN-EMPRESS,—APPELLANT,

*Versus*ZAHARIA AND ANOTHER,—(ACCUSED),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 138 of 1898.

Indian Penal Code, Section 161—"Public servant"—Railway Act, 1890, Sections 3, 137—Railway servant at time of offence temporarily employed in service other than that of a Railway—Goods clerk.

A goods' clerk employed by a Railway Administration is a railway servant within the meaning of Section 3 (7) of the Railways Act, 1890, and under Section 137 of the said Act, is also a public servant for the purposes of Chapter IX of the Indian Penal Code.

Railway servants proper as long as they do not cease to be such continue to be "public servants" for the purposes of Chapter IX of the Indian Penal Code, whatever functions they may be temporarily discharging at the time when the offence by, or in respect of, them is committed.

A goods' clerk in the employment of a Railway Administration suspected certain frauds in the goods' office, and made a report to that effect to his superiors. The matter was subsequently taken up by the Police, and brought to the cognizance of the District Magistrate, who referred it to the Police for inquiry. The goods' clerk had meanwhile been deputed to assist the Police in the discovery and prosecution of the culprits, and while on such duty was approached by the accused, who offered him Rs. 500 if he closed the inquiry, and returned the books unchecked. The goods' clerk, who was throughout in communication with the Police, contrived to have the conversation over-heard by witnesses, and asked the accused to bring the money. They did so, and were arrested by the Police in the act of handing it over to the clerk. The District Magistrate convicted the accused under the second clause of Section 161 of the Penal Code, but they were acquitted on appeal by the Sessions Judge on the ground that at the time of the offence the clerk was employed to assist the Police in the inquiry, and was not, therefore, at that time a Railway servant, as defined in Section 3 (7) of the Railways Act, 1890, and, consequently, not a "public servant" for the purposes of Chapter IX of the Penal Code. On appeal by Government against the order of acquittal,

Held, that inasmuch as the goods' clerk had not at the time of the offence any official functions in the discharge of which he could have shown the favour in consideration of which the bribe was offered, the offence was not covered by the second clause of Section 161, Penal Code.

But held, that the offence fell under the third clause of Section 161.

The accused thought that the clerk alone possessed the technical knowledge necessary to bring home the suspected fraud to them from the records of the goods' office, and that if he represented to the Police

that there was nothing disclosed in the accuseds' books, on comparison with the Railway records, to prove anything against them, he would probably succeed in persuading the Police Inspector in charge of the inquiry, who was a public servant, acting as such, to make a report to that effect to the District Magistrate, and to get the case dismissed and the books returned.

Appeal from the order of S. Clifford, Esquire, Sessions Judge, Delhi, dated 30th October 1897.

Sinclair, Government Advocate, for appellant.

Madan Gopal, for respondent.

The judgment of the Court was delivered by

8th May 1898.

CHATTERJI, J.—The case for the prosecution is briefly as follows:—Mr. Harris was the chief goods' clerk of the East Indian Railway at the Delhi station. He suspected certain frauds in the goods' office, and made a report to that effect to his superiors. He was shortly after transferred to Tundla, where he made a further report, and was then deputed to assist in the discovery and prosecution of the culprits. The proceedings began with a report by Mr. Fitzpatrick, Inspector of Government Railway Police, at the instance of the District Traffic Superintendent, Tundla, on which cognizance was taken of the case by District Magistrate of Delhi, and the matter referred for inquiry to the Police. This was on 11th June 1897. On the same day Mr. Harris, accompanied by the Police, went to the shop of Chuni Ram-Ramdyal, where they seized the shop-books. The accused, Jogdhan, then made an offer to Mr. Harris to close the inquiry, and that very night definitely offered Rs. 500 for the same purpose and the return of the books. On the following morning the two accused repeated the offer in this way that Rs. 250 were to be paid down, and Rs. 250 on the return of the books unchecked. Mr. Harris, who was all along in communication with the Police, contrived to have witnesses to over-hear the conversation, and asked the accused to bring the money. They did so, and were arrested by the Police while in the act of handing it to Mr. Harris, and taken to the District Magistrate.

The above facts have been held to be proved by the District Magistrate, who convicted the accused under Sections 111, and sentenced them to three months' rigorous imprisonment and Rs. 100 fine each. He appears to hold that the accused intended that Mr. Harris should show them the favour they asked for in the discharge of his official functions as a Railway, and, therefore, as a public servant—a matter covered by the

second clause of Section 161 of the Indian Penal Code. He was of opinion that Mr. Harris in the discharge of his new functions continued to be such servant, though he was not doing his proper work. There was also a charge under Section 214 of the Indian Penal Code, but the District Magistrate acquitted the accused of it, and there is no appeal on that question.

On appeal the Sessions Judge held that Mr. Harris, while employed to help the police in the prosecution, or in the inquiry relating to the frauds in the goods' office, was not a Railway servant as defined in Section 3 (7) of the Railway Act, 1890, and was therefore not a public servant for purposes of Chapter IX of the Indian Penal Code. He, accordingly, reversed the conviction, and acquitted the accused. From this acquittal the present appeal has been lodged by the Crown.

In our opinion the District Magistrate appears to be wrong in thinking that the offence is covered by the second clause of Section 161, Indian Penal Code. As a matter of fact, Mr. Harris had at the time no official functions in the discharge of which he could have shown the favour, in consideration of which the bribe was offered. He might possibly have done so, had he continued in his original post, and the case had not gone to Court, by hushing up the inquiry, or by reporting to his superiors that the books of the Railway disclosed no fraud. But at the moment the bribe was offered, the inquiry was a criminal one in the hands of the Police by order of a Magistrate, and it was not possible for Mr. Harris to do the accused the required favour in the discharge of his official functions, and the accused cannot be assumed to have offered a bribe for an obviously impossible consideration. Mr. Harris was not authorized by law or by his superiors to drop the prosecution, or to return the books of the accused, if he thought proper. The whole matter was in the hands of the District Magistrate and the Police.

It appears to us, however, that the facts of the case, if established, are covered by the third clause of Section 161. The accused thought Mr. Harris alone possessed the technical knowledge necessary to bring home the suspected fraud to them from the records of the goods office of Delhi, and this appears to be practically the case. If he represented to the Police that there was nothing disclosed in the accused's books, on comparison with the Railway records, to prove anything against them, he would probably succeed in persuading them

to make a report to that effect to the Magistrate under Section 202, Criminal Procedure Code, and to get the case dismissed and the books returned. This was the service which Mr. Harris could do to the accused, and the Police Inspector in charge of the inquiry was undoubtedly a public servant acting as such. The words of the clause appear clearly to admit of this construction, and to include a service of the nature mentioned above within its scope. *Queen v. Kallsechurn Serishtadar* 3, *W. R., Cr.*, 10, is a case in point. Illustration (c), which is probably meant to exemplify an offence falling under the clause, is not quite apposite to the present case, but it is of course not exhaustive.

The question, then, is whether Mr. Harris was a public servant while looking after the investigation. It is admitted by the Sessions Judge that he was a Railway servant within the meaning of Section 3 (7) of the Railway Act, as he is clearly employed by a Railway administration in connection with the service of a Railway. Clause (2) defines a Railway, which includes, para. (c), all offices, &c., constructed for purposes of, or in connection with, a Railway. A goods' clerk is clearly a Railway servant, and under Section 137 of the Act, Sub-Section (1), is a public servant also for purposes of Chapter IX of the Indian Penal Code. Assuming that the work on which Mr. Harris was employed at the time the bribe was offered to him was not employment in connection with the service of a Railway, did he on that account cease to be a Railway servant or a public servant? The offence may be committed by, or in respect of, one who is not even a public servant, *viz.*, one expecting to be such. The section does not appear to contemplate that at the time of the bribe-taking the accused person should be actually discharging functions which constitute him a public servant. It is sufficient if he is a public servant, and his act falls under one of the three classes specified in the section. If it were otherwise, the Munsif in illustration (a) might escape with impunity if he happened to be on leave when he took the bribe. Mr. Harris had not severed his connection with the Railway, and he was still a goods' clerk, though at the moment he was temporarily deputed to do different work. We are of opinion that Railway servants proper, as long as they do not cease to be such, continue to be public servants for purposes of Chapter IX, Indian Penal Code, whatever functions they may be temporarily discharging at the time offence by, or in respect of, them is committed.

The learned Sessions Judge's view is based exclusively on the nature of Mr. Harris' service at the time the bribe was offered, and has no reference to the nature of the act he was expected to perform in consideration of it. We are of opinion that this view is erroneous. The acquittal must therefore be set aside.

The Sessions Judge has come to no finding on the evidence, as he held the prosecution to be legally unsustainable. We have gone through the record, and are of opinion that the facts found by the District Magistrate are established by the evidence. There is no reason to disbelieve the statements of the witnesses, and the fact that Rs. 250 were actually seized, and were produced in Court, affords the strongest corroboration of their testimony. It is impossible to believe that the case was concocted against the accused in this form. The plea of the accused Zaharia that Mr. Harris, in consequence of his imperfect acquaintance with Urdu, misunderstood the accused's overtures cannot be accepted. Such a misunderstanding was practically impossible, and the payment of the money is not rationally accounted for in the story told by the accused. There are two witnesses, *viz.*, Lachman Singh and Sayad-ud-din, to two of the interviews, and there is no possibility of their having misunderstood the character of the accused's offer. The denial of Jogdhian of all complicity in the offence is not worth consideration. We therefore restore the conviction.

As regards the sentence, the accused were two days in jail, and we consider it unnecessary to send them back to it. But the fine must be a substantial one, so as to be felt by the persons at whose instance the accused presumably committed the offence.

We accept the appeal, reverse the acquittal of the accused, and convict them under Sections $\frac{161}{116}$, Indian Penal Code, and sentence them to two days' rigorous imprisonment (which they have already undergone), and Rs. 200 fine each, with three months' rigorous imprisonment in case of default of payment.

Appeal allowed.

No. 10.

Before Mr. Justice Frizelle, Chief Judge.

JAT SINGH,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 1985 of 1898.

Excise Act, 1896, Section 51—Animals and conveyances liable to confiscation.

Accused was found with $1\frac{1}{2}$ seer of country liquor in his possession. He was carrying it in two bottles in his waistcoat pockets, and was riding on a mare at the time. He was convicted under Section 51 of the Excise Act, 1896, and sentenced to a fine of Rs. 20, and the mare on which he was riding was confiscated.

Held, that the order confiscating the mare, even if legal, was harsh and unnecessary, and must be set aside.

Semble: Animals and conveyances liable to confiscation under the Act are those on which illicit liquor is loaded, and an animal on which a man is merely riding with such liquor in his pockets does not come under that description.

Petition for revision of the order of C. M. King, Esquire, District Magistrate, Ferozepore, dated 7th September 1898.

The judgment of the learned Chief Judge was as follows:—

22nd Novr. 1898.

FRIZELLE, C. J.—Petitioner was found with $1\frac{1}{2}$ seer of country liquor in his possession. He was carrying it in two bottles in his waistcoat pockets, and was riding on a mare at the time. He has been convicted under Section 51 of the Excise Act, 1896, and sentenced to a fine of Rs. 20, and the mare on which he was riding has been confiscated.

The conviction and sentence of fine are quite right, but I do not think the confiscation of the mare was so. Animals and conveyances liable to confiscation under the Act seem to me to be those on which illicit liquor is loaded. An animal on which a man is merely riding with a couple of bottles of liquor in his pockets hardly seems to me to come under this description. Even if the order was legal, I consider it a harsh and unnecessary one.

I cancel this portion of the order and direct that the mare be restored to the petitioner. The conviction and sentence of fine will stand.

No. 11.

Before Mr. Justice Reid and Mr. Justice Anderson.

QUEEN-EMPRESS

Versus

CHETU AND OTHERS,—(ACCUSED).

} REFERENCE SIDE.

Case No. 59 of 1898.

Act XIII of 1859—Criminal Procedure Code, 1898, Sections 5, 83—Execution of warrants issued under Act XIII of 1859.

There is nothing in Section 5, read with Section 83 of the Criminal Procedure Code, 1898, which excludes from the operation of the latter section warrants issued under Act XIII of 1859.

Held, therefore, that a Magistrate has no discretion to decline to execute warrants issued by a Magistrate of another district under Section 1 of Act XIII of 1859 and forwarded to him for execution under Section 83 of the Criminal Procedure Code against persons resident in his district.

Case referred by Diwan Narendra Nath, District Magistrate, Gujranwala, by order, dated 26th September 1898.

Sinclair, Government Advocate, for Crown.

The judgment of the Court was delivered by

REID, J.—This is a reference under Section 438 of the Code of Criminal Procedure by the District Magistrate of Gujranwala. 9th Decr. 1898.

The question for consideration is whether a Magistrate has discretion to decline to execute warrants issued by a Magistrate of another district, under Section 1, Act XIII of 1859, and forwarded to him for execution under Section 83 of the Code of Criminal Procedure against persons resident in his district.

Subsequently to the publication of the Circular of the Government of India in 1896 on this subject it has been twice considered by a Division Bench of the Madras Court, *Queen-Empress v. Kattayan*, I. L. R., XX Mad., 235, and *Queen-Empress v. Muthaya*, I. L. R., XX Mad., 457, and once by a Division Bench of this Court in Criminal Revision No. 9 of 1897 (unpublished). The question referred in the last-named case was whether a Magistrate to whom a complaint is made under the Act should refuse to issue a summons or warrant for execution at a distance and refer the complainant to a civil suit, but the *ratio decidendi* is in point. The above judgments were delivered before the amendments of Section 5 of the Code by Act V of 1898, and that amendment strengthens the arguments in favour of the conclusions arrived at in them. Reading Section 5 and Section

83 together we can find nothing excluding from the operation of the latter section warrants issued under Act XIII of 1859.

The object of that Act was to supply a remedy where the remedy by suit in a Civil Court is inadequate, and to subject to punishment persons guilty of fraudulent breaches of contract described therein, and we see no reason to differ from the conclusions arrived at in the judgments referred to that the provisions of the Code refer to a warrant issued under the Act.

A Magistrate to whom a warrant is forwarded under Section 83 of the Code has no discretion except as to the amount of bail and similar details, and must execute it as directed.

Such discretion as there is in the matter is vested in the Magistrate to whom a complaint under the Act is made, and is to be exercised in the manner applicable to complaints under the Code.

The record will be returned to the Magistrate of the district with these remarks.

No. 12.

Before Mr. Justice Frizelle, Chief Judge.

LAJJE RAM AND OTHERS,—(ACCUSED),—PETITIONERS,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Case No. 2138 of 1898.

Penal Code, Sections 451, 456, 509—Intention to commit offence—Rescue from illegal arrest.

In a case where it was proved that the accused was found at night inside complainant's house where he had gone for the purpose of visiting the latter's widowed daughter-in-law, a woman of loose character, with whose knowledge and consent he had in all probability entered the room,

Held, by the Chief Court, on the revision side, that accused had been wrongly convicted under Section 456 of the Penal Code, as he had none of the intentions necessary to constitute the offence described in Section 451 of the Code and could hardly have had the intention of committing the offence described in Section 509.

Held, therefore, that inasmuch as the apprehension of accused was illegal under Section 59 of the Criminal Procedure Code, his conviction under Section 224 and that of his brothers under Section 225 of the Penal Code must be set aside.

Petition for revision of the order of S. Clifford, Esquire, Sessions Judge, Delhi Division, dated 10th October 1898.

Madan Gopal, for petitioners.

The judgment of the learned Chief Judge was as follows :—

FRIZELLE, C. J.—The petitioner, Lajje Ram, was found and locked up inside a room, visiting a widow daughter-in-law of the complainant. His brothers, the other two petitioners, came to his rescue and forcibly released him, and all three have been convicted, Lajje Ram under Sections 456 and 224, and the others under Section 225, Indian Penal Code. I do not think any of the convictions can stand, as Lajje Ram was not guilty of criminal trespass and his apprehension was, therefore, illegal under Section 59, Criminal Procedure Code. He had none of the intentions necessary to constitute the offence described in Section 451, Indian Penal Code. His intention is admitted by the Sessions Judge to have been to visit or have intercourse with one of the daughters-in-law of complainant, both of whom are widows. The evidence shows that the one he was found with was Mussammatt Ganga Devi, and also that she is a woman of loose character. That she is so is proved not only by the evidence in this case but by a report made by complainant in the Thana in 1896 that she was pregnant and that he was

29th Novr. 1898.

afraid she would procure an abortion. Lajje Ram therefore could hardly have had the intention of committing the offence described in Section 509, Indian Penal Code (insulting the modesty of a woman). There is every reason to suppose that he entered the room with her knowledge and consent, and that her modesty would not be insulted by anything he intended to do. This makes the case different from those reported in *I. L. R.*, *XVI Calc.*, 657, and *XXII Calc.*, 391 and 994, on which the Sessions Judge relies in supporting the convictions.

I reverse the finding and sentences and acquit the petitioners. The fines, if realized, will be refunded, and Lajje Ram will be discharged from his bail.

No. 13.

Before Mr. Justice Reid and Mr. Justice Anderson.

GHASI,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 2170 of 1898.

*Criminal Procedure Code, 1898, Sections 190 (1) (c), 191, 534—
Omission to comply with requirements of Section 191 of the Code.*

The Magistrate having taken cognizance of an offence under clause (c) of sub-section (1) of Section 190 of the Criminal Procedure Code, 1898, proceeded to try the case himself, and before commencing to record evidence omitted to inform the accused that he was entitled to have the case tried by another Court as prescribed by Section 191 of the Code. The accused having been convicted appealed to the Sessions Judge, and made it one of the grounds of his appeal that the omission to comply with the terms of Section 191 invalidated the trial. The Sessions Judge, however, overruled this contention, relying on the analogy of Section 534 of the Code.

Held, that inasmuch as the Magistrate had interested himself very considerably in instituting the prosecution and as his mind could not under the circumstances have been completely free from bias, it was incumbent on him to comply with the terms of Section 191 and to afford the accused an opportunity of making his election.

The Court accordingly set aside the conviction and ordered a new trial before another Magistrate.

Petition for revision of the order of S. Clifford, Esquire, Sessions Judge, Delhi Division, dated 30th October 1898.

Browne, for petitioner.

The judgment of the Court was delivered by

20th Decr. 1898.

ANDERSON, J.—In this case the Magistrate (Mr. Warburton) himself instituted a prosecution for theft against the appellant

Ghasi upon information received from some person other than a police officer as contemplated by clause (c), sub-section (1) of Section 190 of the Criminal Procedure Code. He proceeded to try the case himself and before commencing to record evidence omitted to inform the accused that he was entitled to have the case tried by another Court as prescribed by Section 191 of Act V of 1898.

The trial resulted in the conviction of Ghasi, who appealed to the Sessions Judge and made it one of his grounds that this formality having been neglected the trial had been invalidated.

The learned Sessions Judge had some doubts as to whether he should not have ordered a re-trial, but decided that the omission did not invalidate the trial. In reaching this decision he was influenced by what he terms "the analogy of Section 534, Criminal Procedure Code," but there is no such provision entered in the Code with regard to an omission under Section 191 as appears in Section 534 in respect of an omission to carry out the prescribed procedure of Section 454.

Section 191 of Act V of 1898 is in modification of the same section in Act X of 1882 as amended by Act III of 1884, and it is now made clear that the accused shall be informed of his right to be tried by another Court, and that an opportunity must be given him of making his choice before any evidence is taken. We are not prepared to hold that the omission to inform the accused must always fall within the provisions of Section 537 of the Code, and, in the present case, we are clearly of opinion that it was incumbent on the Magistrate to have afforded to the accused an opportunity of making his choice. The Magistrate had interested himself very greatly in preparing the case, and with the best intention possible his mind could hardly have been free from all bias. The opening pages of his judgment show that he had been privately hearing unfavourable reports of the Thanadar who had sent up a case against Harnam and had not proceeded against Ghasi, and it was because he believed that the Thanadar had misconducted himself that he took up the inquiry so zealously.

We are not thoroughly satisfied that the Magistrate was completely free from bias, and, although he has taken great pains with the case, we think the appellant has been to some extent prejudiced by his action, and it is therefore all the more necessary to pay attention to the requirements of Section 191. *I. L. R., XX Cal., 857*, is a case somewhat resembling the present, in which it was held that a Magistrate who had taken

part in collecting evidence himself was disqualified from trying the case.

For the reasons given above we set aside the conviction and direct a new trial before another Magistrate.

Application allowed.

No. 14.

Before Mr. Justice Frizelle, Chief Judge, and Mr. Justice Reid.

REVISION SIDE. { KARAM DIN AND OTHERS,—(ACCUSED),—PETITIONERS,
Versus
QUEEN-EMPRESS,—RESPONDENT.

Case No. 1435 of 1898.

Criminal trial—Hearing fixed for specified date but subsequently accelerated—Accused's pleader unable to attend at hearing on altered date.

On the 16th May the trial of accused was fixed for the 26th May and petitioners' chief pleader was informed of the latter date, but on the 17th, the date of hearing was changed to the 18th. The said pleader was informed of the change by telegram, and in reply telegraphed to the effect that he could not appear on the 18th, and asked to have the hearing fixed for the 23rd. Contrary, however, to this request and the wishes of the accused's other pleaders, the trial was proceeded with on the 18th and continued till the 21st, when the case was decided and accused convicted.

Held, that the procedure of the Magistrate was improper and gave accused just cause for complaint. If there were any reasons for accelerating the date of hearing, the trial should not have been concluded and judgment pronounced without waiting until the date desired by accused's pleader or the date originally fixed, hearing the pleader and allowing him to recall any of the witnesses he wished.

The Chief Court, however, refused to order a re-trial of accused on the ground that the irregularity and impropriety of the procedure had not under the circumstances of this case occasioned any failure of justice.

Petition for revision of the order of Rai Bahadur Lala Buta Mal, Sessions Judge, Sialkot Division, dated 6th July 1898.

Lakhshmi Narain and K. P. Roy, for petitioners.

The judgment of the Court was delivered by

12th Augt. 1898.

FRIZELLE, C. J.—The main purport of this petition for revision is that a new trial should be ordered on the ground that the procedure of the Magistrate who tried the case was irregular and that petitioners were thereby seriously prejudiced. The irregularity complained of was this, that the trial was fixed on the 16th May 1898 for the 26th May 1898, and petitioners' chief pleader, Mr. K. P. Roy, informed of this date; that the date was on the 17th changed to the 18th, and Mr. Roy informed by telegram; that he replied by telegram saying that

he could not appear on the 18th and asking to have the 23rd fixed, but contrary to the wishes of petitioners' other pleaders the trial was proceeded with on the 18th and continued until the 21st, when the case was decided and petitioners convicted. We are of opinion that the procedure was improper and gave petitioners just cause for complaint. If there were any reasons for accelerating the date, such as that alleged for the prosecution, the trial should not have been concluded and judgment pronounced without waiting until the date, which was a near one, desired by petitioners' pleader or the date originally fixed, hearing the pleader, and allowing him to recall any of the witnesses he wished.

But the irregularity and impropriety of the procedure did not, we think, occasion any failure of justice, and a new trial ought not to be ordered. When the Magistrate decided to proceed with the case, petitioners' other pleaders offered apparently no further objection, as they might have done, by withdrawing from the case, applying for its transfer or declining to cross-examine the witnesses or produce witnesses for the defence. The evidence was fully gone into, the witnesses were cross-examined and witnesses for the defence heard. The learned pleader (Mr. K. P. Roy) has also had an opportunity of fully arguing the case on the merits in the appeal to the Sessions, and did so argue it. Objection is verbally taken to the fact that the Sessions Judge in his judgment wrongly referred to the previous case in which one Said Mir was complainant and which had not been decided when the Sessions Judge heard the appeal. We think there was nothing wrong in the Sessions Judge alluding to that case. He only mentions the fact of a complaint having been made and formed no opinion as to what the facts of that case were. The case quoted before us, *I. L. R., XXII Cal.*, 998, is therefore hardly analogous.

Indeed no objection is made in the petition for revision as to any such matter having been wrongly taken into consideration by the Sessions Judge. We therefore see no reason for going into the whole of the evidence, and no ground is shown us for considering it likely that a wrong conclusion has been come to on the evidence. But we think good reason is shown us for modifying the punishments. The sentences are excessively severe, the case has evidently been a good deal exaggerated, and the injuries to the two men assaulted do not seem to us so severe as they have been represented. Still the case was one which requires a severe sentence, and we therefore only interfere

to the extent of reducing the sentences on each of the petitioners to one year's rigorous imprisonment with one month's solitary confinement.

We hope the Magistrate will abstain from such hasty and inconsiderate action as that we have commented upon in future.

Convictions upheld: sentences modified.

No. 15.

Before Mr. Justice Frizelle, Chief Judge, and Mr. Justice Reid.

QUEEN-EMPRESS,—APPELLANT,

Versus

KHUSHAL SINGH AND OTHERS,—(ACCUSED),—
RESPONDENTS.

Case No. 166 of 1898.

Appeal by Government from order of acquittal—Appeals in petty cases.

Held, that appeals by Government from orders of acquittal should be made only in cases of some importance.

Appeal from the order of Sardar Gurdial Singh, Man, Sessions Judge, Sialkot Division, dated 16th November 1897.

Robinson, Junior Government Advocate, for appellant.

The judgment of the Court was delivered by

18th Novr. 1898.

FRIZELLE, C. J.—Rice and almonds, which complainant claimed as stolen from him, were admittedly found in Khushal Singh's possession. Khushal Singh did not allege that they were his own. He admitted that he received them from the other accused, and, although such articles are not usually identifiable, we are satisfied from this admission of Khushal Singh, from the articles being found with him immediately after the theft, and from other articles, the produce of the same theft, being given up by the other accused, that the rice and almonds found in Khushal Singh's house belonged to complainant and were stolen from him. We also have no doubt that Khushal Singh knew or had reason to believe the articles to be stolen if he did not take part with other accused in committing the actual theft. He received the things under suspicious circumstances from persons well known to be bad characters at an early hour of the morning when he must have suspected that they were returning from a thieving expedition, and when they were most probably laden with the other plunder. We think, therefore, that he ought not to have been acquitted by the Sessions Judge, but his conviction by the Magistrate should have been rather under

APPELLATE SIDE. }

Section 411, Indian Penal Code, than Section 457. The prosecution itself offered evidence to show that he only received the rice and almonds from the other accused.

As to these other accused—Ali Manna, Khairu and Ram Singh—we find it proved that they pointed out a place on the bank of a *nullah*, where two tins of *ghi* and a broken *chati* of *ghi* were found buried in the ground. They did so immediately after Khushal Singh had given information against them. As these articles were in the list of stolen property reported by complainant before the discovery was made, as they were discovered very soon after the theft, on Khushal Singh's giving up the names of the thieves, and as there was nothing unlikely in complainant being able to identify the tins, we have no doubt that these also were stolen. We see no reason to reject the evidence that these accused pointed out the place where the articles were found. They could not have done so without having committed the theft. Evidence of this kind is often made up, but we think it impossible that it could have been made up in this case. Even the Sessions Judge, although he acquitted the accused, did not disbelieve the evidence as to the manner in which the *ghi* was found, and only acquitted them because he doubted the evidence of identification as to which we disagree with him.

We, therefore, accept the appeal and convict all the accused. Khushal Singh under Section 411, and Ali Manna, Khairu and Ram Singh under Section 457, Indian Penal Code. Only a moderate sentence is necessary. None of the accused has ever previously been convicted, the theft was of a petty nature, the value of the stolen property being only Rs. 22 or Rs. 23 altogether, and three of the accused have been already a considerable time in confinement. We may remark that the case was hardly one worth appealing. Appeals by Government should, we think, only be made in cases of some importance.

We sentence Khushal Singh to six months' and Ali Manna, Khairu and Ram Singh to nine months' rigorous imprisonment, with one month's solitary confinement each. Sentence to take effect from date of imprisonment in pursuance of this order, and District Magistrate should take the necessary measures for Khushal Singh's arrest.

Appeal allowed.

No. 16.

Before Mr. Justice Clark, Chief Judge.

BURE KHAN,—(ACCUSED),—PETITIONER,

REVISION SIDE. }

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 2416 of 1898.

Criminal Procedure Code, 1898, Section 195 (7)—Sanction for prosecution—Subordination of Courts.

For the purposes of Section 195, Criminal Procedure Code, 1898, the Court of the District Judge is the Court to which a Munsif is subordinate, and it is the Court of the District Judge and not of the Divisional Judge which can give sanction for prosecution in respect of offences referred to in the said section when committed in the Court of a Munsif.

Petition for revision of the order of G. Lewis, Esquire, Divisional Judge, Amritsar Division, dated 20th August 1898.

Jaishi Ram, for petitioner.

The judgment of the learned Chief Judge in Chambers was as follows :—

25th Jan'y. 1899.

CLARK, C. J. —Under Section 195, Criminal Procedure Code, the Divisional Judge has given sanction for the prosecution of Bure Khan under Sections 193, 196, 465 and 471, Indian Penal Code; these offences having been committed before Lala Amolak Ram, Munsif, Gurdaspur, who has left the district.

The law has been changed in the new Criminal Procedure Code, and Section 195 (7) lays down that—

“For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say, (a) where such appeals lie to more than one Court, the appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate.”

For the purposes of this section the Court of the District Judge is the Court to which the Munsif is subordinate, and it is the Court of the District Judge, not of the Divisional Judge, which can give sanction for offences referred to in Section 195, Criminal Procedure Code, committed in the Court of a Munsif.

The sanction of the Divisional Judge is set aside as without jurisdiction.

Full Bench.

No. 17.

Before Mr. Justice Clark, Chief Judge, Mr. Justice Reid, Mr. Justice Chatterji, and Mr. Justice Anderson.

QUEEN-EMPRESS,

Versus

SAIF ALI,—(ACCUSED).

Case No. 1075 of 1898.

} APPELLATE SIDE.

Criminal Procedure Code, 1898, Section 545—Culpable homicide—Power of Court to grant compensation—Act XIII of 1855—"Injury"—Penal Code, Section 44—Enhancement of sentence.

Held, by the Full Bench, that it is competent to a Court, under Section 545 of the Criminal Procedure Code, 1898, to award part of the fine imposed under Section 304 of the Penal Code for the offence of culpable homicide not amounting to murder to the widow of the person killed, in compensation for the injury caused by the offence committed, the loss of her husband's support affecting a widow prejudicially in a legal right, and being therefore "an injury" as defined in Section 44 of the Penal Code, for which substantial compensation can be awarded by a Civil Court (I. L. R., XII Mad., 352, and I. L. R., XXI Mad., 74 (F. B.), not followed).

Where the accused, enraged by vile abuse addressed to him by the deceased, struck the latter a severe blow on the head with the first thing that came to hand, *viz.*, a wooden lamp-stand, which blow fractured the skull and caused death not long afterwards, *held, by the Division Bench* that a sentence of two years' rigorous imprisonment, including two months' solitary confinement and a fine of Rs. 100, or, in default, six months' further rigorous imprisonment, passed by the District Magistrate was, under the circumstances of the case, not inadequate, and should not be enhanced.

Per Chatterji J. (in Chambers).—An enhancement of sentence should take place only when the sentence awarded is manifestly inadequate, and the powers of the Chief Court for such purpose should be exercised only under exceptional circumstances.

Case reported by G. Leslie Smith, Esquire, Sessions Judge, Rawalpindi Division.

The facts of this case were as follows:—

Saif Ali, accused, lived in a small hamlet belonging to Deryala Khaki, in which there were only two dwelling-houses, Saif Ali's and his uncle Dadu's.

On the day of the occurrence of the offence, Saif Ali's lamb was seen trespassing on the crop, and Daraz remonstrated with him about it. An altercation ensued, and Daraz went to the door of Saif Ali's house, inside which Saif Ali had gone, and continued to abuse him. Saif Ali raised a wooden lamp-stand

which was standing just inside the door and hit Daraz with it one blow on the forehead which smashed his skull and felled him, and from the consequences of which he died five days after.

The accused was convicted and sentenced by the District Magistrate as follows :—

The accused, on conviction by J. Wilson, Esquire, exercising the powers of a District Magistrate in the Rawalpindi District, was sentenced, by order dated 7th April 1898, under Section 304, Part II of the Indian Penal Code, to two (2) years' rigorous imprisonment, including two months' solitary confinement and to pay Rs. 100 fine, or, in default, six months' further rigorous imprisonment.

The proceedings were forwarded by the learned Sessions Judge for revision on the following grounds :—

“ On the facts found (and I think rightly found) by the District Magistrate, I am of opinion that the sentence awarded was inadequate. A very severe blow was given on the head with a very formidable weapon, which blow fractured the skull and caused death not long afterwards. The case is very much on all-fours with that reported in No. 5, *Punjab Record*, Criminal, 1893, and in that case a sentence of five years was passed by the Chief Court. A similar sentence appears to be called for here.

“ The proceedings of the case are therefore submitted to the Chief Court, Punjab, on the Criminal Revision Side under Section 438, Criminal Procedure Code, with a view to enhancement of sentence.”

The case in the first instance came before Mr. Justice Chatterji, in Chambers, who passed the following order :—

16th June 1898.

CHATTERJI, J.—I have gone through the record and do not on the whole see sufficient grounds for enhancing the sentence. The accused hit a single blow, and there is no question that he had any intention of causing death or bodily injury likely or sufficient in the ordinary course of nature to cause death. It has been found that he knew that he was likely to cause death, and this is probably right, though if the Court had been a little more indulgent it might have found that the accused knew nothing more than that he was likely to cause grievous hurt. See *Punjab Record*, No. 18 of 1893, Cr., which partially exemplifies this remark. Altogether the act was the result of a momentary impulse and the consequences were probably due as much to

misfortune as to any conscious effort on the accused's part. An experienced and careful Magistrate has, in view of all the circumstances, considered a sentence of two years sufficient to meet the ends of justice, and I am not prepared to say that he is egregiously wrong. An enhancement should take place only when the sentence is manifestly inadequate, and the powers of this Court for this purpose should be exercised only under exceptional circumstances. Possibly a slightly heavier sentence might have been better suited to the case, but I doubt whether it was necessary to inflict one of five years' rigorous imprisonment. In No. 5, *Punjab Record*, 1893, the facts were more adverse to the accused. But even if the Sessions Judge's opinion is right, it is not necessarily a good reason for enhancement. See No. 7, *Punjab Record*, 1889.

I accordingly decline to act on the Sessions Judge's recommendation. But with reference to the order for compensation I should like to be informed by the District Magistrate who the heirs of the deceased are in whose favour it has been passed. Compensation can only be awarded where substantial compensation can be recovered by civil suit. Act XIII of 1855 lays down the law on the subject, and the heirs must be such as can claim compensation under Section I of that Act.

On the receipt of the District Magistrate's reply this part of the case will be disposed of.

On receipt of the return of the District Magistrate the case was referred to the Division Bench by the following order of the learned Judge in Chambers:—

CHATTERJI, J.—The return of the District Magistrate is that 12th Aug. 1898. the deceased has left a son, Jiwan, and a widow, Mussammât Sardaro, who are his heirs.

Under Section 1, Act XIII of 1855, these persons would be entitled to maintain a civil suit for damages or compensation for the injury to the deceased if the defendant's act, neglect or default which caused the death was such as would have entitled the deceased to maintain an action of this nature had he not died. The District Magistrate's order for compensation is correct if substantial compensation is recoverable by civil suit by these heirs for the injury which caused Daraz's death.

But *Punjab Record*, No. 6, of 1890, Criminal, is against this view, so also in *re Luchmaka* (I. L. R., XII Mad., 352).

I have some doubt as to the correctness of these rulings, but a very recent Full Bench Judgment of the Madras Court,

Yala Gangulu v. Moundi Dali (I. L. R., XXI Mad., 74) agrees with them. The earlier cases may be put out of consideration, as the previous Acts were differently worded. If the Full Bench Judgment and No. 6 of 1890, Criminal, are correct, the order of the District Magistrate must be set aside. I, however, think it best to refer the question to a Bench. If the District Magistrate's order is wrong and without authority, I think we should set it aside, as it causes substantial loss to Government which would otherwise be entitled to the fine.

The question of law involved was referred to a Full Bench by the following order of the Division Bench (*Reid and Anderson, JJ.*):—

17th Oct. 1898.

REID, J.—Having considered the evidence on the record, we concur with Mr. Justice Chatterji that the sentence passed by the District Magistrate is not inadequate: the prisoner was enraged by vile abuse addressed to him by the deceased, and struck only one blow with the first thing that came to hand, a wooden lamp-stand. In No. 5, *Punjab Record*, Criminal, 1893, the prisoner killed his wife in the course of a quarrel, and deserved a more severe sentence than the prisoner before us, who struck a man who abused him. The question raised by Mr. Justice Chatterji, whether compensation can be awarded to the son and widow of the deceased under Section 545 of the Code of Criminal Procedure of 1882, reproduced *totidem verbis* in the Code now in force, raises considerable difficulty.

No. 6, *Punjab Record* (Cr.), 1890, is not in point, inasmuch as Act XIII of 1855 is an Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong, and the persons fined in that case were convicted only under Section 323 of the Penal Code, and were held not to be responsible for the death of the deceased, who died of apoplexy. There can be no doubt of the correctness of the ruling quoted.

The question is whether the words in Section 545, "the Court may order the whole or any part of the fine recovered to be applied in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil suit," are limited as they have been held to be limited in *Yala Gangulu v. Moundi Dali*, I. L. R., XXI Mad. (F. B.), 74. The reference to the Full Bench was made because the correctness of the ruling in *re Lutchmaka* (I. L. R., XII Mad., 352) was doubted.

In both these cases death was caused by a rash or negligent act, the conviction being under Section 304-A of the Code.

In *XII Mad.*, no reasons are given and no authority is quoted. In *XVI Mad.*, compensation was held not to be awardable for reasons which appear to be open to doubt. Had the legislature intended to limit the compensation awarded under Section 545 (b) to the person against whom the offence was committed it would have been very easy to embody words of limitation in that clause. The reasons given in the referring order in *XVI Mad.* support the view that compensation is awardable to the widow or son.

As this view is opposed to that expressed by the Full Bench of the Madras Court, we refer to a Full Bench the question whether, under Section 545 of the Code of Criminal Procedure, compensation may in cases of culpable homicide be awarded to any person for whose benefit a suit would lie under Act XIII of 1855.

The judgment of the Full Bench was delivered by

REID, J. (*Clark, C. J., Chatterji and Anderson, JJs., concurring*). 29th Jan'y. 1899.]

—The question for consideration is whether, under Section 545 of the Code of Criminal Procedure, part of the fine imposed under Section 304 of the Penal Code for the offence of culpable homicide not amounting to murder may be paid to the widow of the person killed, in compensation for the injury caused by the offence committed. It is unnecessary in this particular case to deal with the question of payment to other relations.

Under Act XIII of 1855, a suit may be maintained for the benefit of the widow against the person causing her husband's death, and the Court may give such damages as it may think proportioned to the loss resulting from the death to the widow, the object of the Act being to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong.

Section 545 of the Code empowers a Court which passes a sentence of fine to order the whole or part of any fine recovered to be applied in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil suit.

There is no suggestion that the widow in this case could not recover substantial compensation under Act XIII.

The authority on the question is limited.

Under Section 44, Act XXV of 1861, which allowed compensation out of the fine imposed to be paid to, or for, the person who had suffered by an offence, not exceeding the loss appearing to be caused to him, the Calcutta Court, in *re*

Roop Lal Singh (X W. R., Cr., 39), held that, if compensation could be awarded to all the heirs of any person who had been killed it was impossible to say where such orders would stop, and that compensation could only be awarded to the actual sufferer, or the person directly injured by the offence.

Section 44 did not contain the words "where substantial compensation is, in the opinion of the Court, recoverable by civil suit," which obviate the difficulty pointed out by the Calcutta Court, arising from holding that compensation could be awarded to all heirs of the deceased, Act XIII limiting these heirs to the wife, parent, husband, or child.

Queen v. Moorut Loll (VI W. R., Cr., 93) is not in point, death not having been caused by the offender, nor is No. 6, *Punjab Record* (Cr.), 1890, the offenders therein being convicted only of causing simple hurt, and not being held responsible for the death of the person hurt, which was held to have resulted from apoplexy. *In re Lutchmaka* (I. L. R. XII Mad., 352), it was held that Section 545 of the Code did not contemplate an order for compensation, to be paid out of a fine imposed under Section 304-A, to the widow of the man whose death was caused by the rash or negligent act in question. No reasons were recorded for the decision. The same question arising in *Yala Gangulu v. Moundi Dali* (I. L. R., XXI Mad. (F.B.), 74) was referred to a Full Bench, because the correctness of the ruling in *XII Mad.* was doubted.

The Full Bench confirmed that ruling, holding that the Codes of 1872 and 1882 had made no change in the law contained in the Code of 1861, under which it was obvious that compensation could not have been awarded to the widow. Section 545 of the Code of 1882 is reproduced in the present Code, while the corresponding Section 308 of the Code of 1872 provided that part of the fine might be awarded to, or for, the benefit of the complainant, or the person injured, or both, in compensation for the offence complained of, where such offence could, in the opinion of the Court, be compensated by money.

With all deference to the opinion expressed by Sheppard, J., and concurred in by the rest of the Madras Full Bench, the change in the language of the Codes appears to me significant, whatever the true interpretation of Section 44 of the Code of 1861 may have been.

The omission of the words "the person who has suffered by such offence," which appeared in the Code of 1861, and of "the complainant, or the person injured, or both," which appeared

in that of 1872, from Section 545 of the Codes of 1882 and 1898, and the language of (1) (a) of that section lead me to the conclusion that compensation may now be awarded to the widow. It is true, as laid down in the Madras ruling, that "injury" in Section 545 must be interpreted, having regard to Section 4 (1) of the Code and Section 44 of the Penal Code, as defined in the latter section, *i.e.*, harm illegally caused to any person in body, mind, reputation, or property, but I do not think that interpretation is opposed to my view of the law.

In the notes to the Penal Code by Sir W. Morgan, C.J., and A. C. Macpherson, J., it is said that an act which is by law wrongful as regards the person complaining, that is, which affects him prejudicially in some legal right, is an injury, and in my opinion the definition in Section 44 was intended to be as wide as possible.

It does not appear to me that the word "injury" in the preamble to Act XIII bears a wider interpretation than the same word used in Section 545 (1) (b), and the words in that sub-section, "where substantial compensation is recoverable by civil suit," appear to me to mean "if the circumstances are such that some person could recover substantial compensation by civil suit."

Act XIII is described, as already stated, as "an Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong." It is a reproduction of Lord Campbell's Act, IX & X Victoria, Chapter 92, under which it has been ruled that the person for whose benefit the action is brought must have suffered some pecuniary loss by the death of the deceased, pecuniary loss meaning some substantial detriment in a wordly point of view, including loss of support and even loss of mere gratuitous liberality—*Franklin v. South Eastern Railway Company*, 3. Hurl and N., 211; *Pym v. G. N. Railway Company*, 4 B. and S., 396; *Hetherington v. North Eastern Railway Company*, 9. Q. B. D., 160; and *Dalton v. South Eastern Railway Company*, 27. L. J., C. P., 227. It was held in *Osborn v. Gillet*, L. R. 8, Ex. 88, that grief, mourning and funeral expenses could not be taken into account, but I think the authorities quoted above justify the conclusion that loss of her husband's support affects a widow prejudicially in a legal right, and is therefore an injury as defined in the Penal Code for which substantial compensation can be awarded by a Civil Court, the right of a woman to be supported by her husband being an existing right.

For these reasons I would answer the question referred in the affirmative.

The case was thereafter disposed of by the following order of the Division Bench:—

31st Jany. 1899.

REID, J.—In accordance with our view of the facts, recorded in our referring order of the 17th October 1898, and with the decision of the Full Bench, we maintain the order of the District Magistrate.

No. 18.

Before Mr. Justice Reid.

GOBIND RAM AND OTHERS,—(ACCUSED)—
PETITIONERS,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 247 of 1899.

REVISION SIDE. {

Sanction for prosecution—Penal Code, Section 193—False evidence—Inquiry under Act XXXVII of 1850—Repeal of Section 17 of Act XXXVII of 1850, effect of—Oaths Act, 1873, Sections 4, 14—Validity of sanction.

Certain persons having given evidence before Commissioners appointed under Act XXXVII of 1850 to hold an inquiry into the behaviour of a certain Judicial Officer, the said Commissioners thereafter on the application of the Government Advocate, but without notice to the accused, granted sanction for their prosecution under Section 193 of the Penal Code. At the commencement of the trial before the District Magistrate, preliminary objections were taken as to the nature and validity of the sanction, but were overruled, whereupon accused applied to the Chief Court on the revision side, and it was contended, on their behalf, that the sanction should be set aside because, *inter alia*, (1) the repeal of Section 17 of Act XXXVII of 1850 by Act XII of 1876 showed that it was not intended that witnesses who gave false evidence before a Commission appointed under the first-mentioned Act should be punished therefor, and (2) the sanction was vague and indefinite, granted without notice to accused, and was not necessary for the ends of justice.

Held, that Section 17 of Act XXXVII of 1850 had been repealed merely because the provision therein contained had been rendered obsolete by the enactment of the Penal Code and the Oaths Act, 1873, and that inasmuch as the Commissioners were empowered under Act XXXVII of 1850 to receive and record evidence, they were authorised under Section 4 of the Oaths Act to administer oaths and affirmations in the exercise of the power so conferred on them.

Held, therefore, that under Section 14 of the Oaths Act, witnesses examined before the said Commissioners were bound to state the truth, and rendered themselves liable to be prosecuted under Section 193 of the Penal Code if they testified falsely.

Held, further, that the sanction, read as it should be with the application for sanction, was sufficiently explicit; that under the circumstances of the case previous notice to the accused was unnecessary, and finally that the prosecution of witnesses who gave false evidence in an inquiry such as that in question was obviously in the interests of justice.

Petition for revision of the order of Captain C. P. Egerton, District Magistrate, Mooltan, dated 27th January 1899.

S. P. Roy, for petitioners.

The judgment of the learned Judge was as follows :—

REID, J.—Section 17, Act XXXVII of 1850, runs as 20th Feby. 1899. follows :—

“ All witnesses either for the prosecution or defence shall be examined on oath, or if exempted from taking an oath in Courts of Justice, on solemn affirmation, to be administered in either case by one of the Commissioners; and every witness so examined and wilfully giving false evidence on any material point shall be deemed guilty of, and liable to, the penalties of perjury.”

It was repealed by Act XII of 1876, a repealing Act passed because it was expedient that enactments which had ceased to be in force otherwise than by express and specific repeal, or had by lapse of time or change of circumstances become unnecessary, should be expressly or specifically repealed.

It is contended that by repealing Section 17 the Government of India intended that witnesses who gave false evidence before a Commission appointed under the Act should not be punishable. This contention has no force. Act XXXVII of 1850 enforces the Commissioners appointed under it to receive and record evidence, and under Section 4 of the Oaths Act (X of 1873) they are authorised to administer oaths and affirmations in the exercise of the powers so conferred on them. Under Section 14 of the latter Act witnesses before them are bound to state the truth. The passing of the Penal Code and the Oaths Act obviously rendered Section 17 of the Act of 1850 unnecessary, and it was struck out of the Statute book.

It is unnecessary at this stage to consider whether the proceedings before the Commission for the trial of Sardar Gurdial Singh were or were not judicial proceedings, either with reference to Section 193 of the Indian Penal Code, or with reference to the sanction under Section 195 of the Code of Criminal Procedure. The latter part of Section 193 applies even if the proceedings were not judicial, while the District

Magistrate could take cognizance under Section 190 of the Code of Criminal Procedure if the Commissioners had no power to sanction under Section 195.

The application for sanction and the sanction, read together, are sufficiently explicit, as is admitted by counsel whose contention that the sanction must contain all particulars, independently of the application, has no force, and is opposed to the authorities followed by this Court.

The question whether the Commissioners were *functi officio* when they granted sanction has been expressly reserved by the Court below and need not be considered here at this stage.

Under the circumstances, I concur with the District Magistrate in holding that the sanction is not bad for want of notice, and it is obvious that the prosecution of witnesses who give false evidence in an inquiry such as that in question is in the interests of justice. No attempt has been made to support ground 3 (3). I reject this application.

Application dismissed.

REVENUE JUDGMENTS,

1898.

INDEX

TO

REVENUE JUDGMENTS.

1898.

The references are to the Nos. given to the cases in the "Record."

No.

A.

Acquiescence.—Occupancy rights, transfer of, by tenant—Effect of acquiescence on part of landlord—Acquiescence, facts constituting.—See Landlord and Tenant.

Act XVII of 1887.—See Punjab Tenancy Act, 1887.

Act XVII of 1887.—See Punjab Land Revenue Act, 1887.

Appeal in Revenue Cases.—Punjab Land Revenue Act, 1887, Sections 13, 112, 116, 118—Application for partition—Plea that holding had been already partitioned privately—Courts of appeal—Question "as to property to be divided" or "as to title in the property of which partition is sought"—Entries in Settlement Records—See Partition.

" " " *Punjab Tenancy Act, 1887, Sections 5, 6, 8—Suit for declaration of occupancy status of highest class—Duty of Court to consider whether plaintiff entitled to inferior right than that claimed—Civil Procedure Code, 1882, Section 53—Material irregularity—Collector deciding appeal in absence of record, which had been lost.—Plaintiff's suit for a declaration of occupancy status under Section 5 (i) (a) of the Punjab Tenancy Act, 1887, was dismissed by the lower Courts on the ground that as he and his ancestors had always paid half *batai*, he was not entitled to the status claimed. It appeared, however, that plaintiff and his ancestors had held the land for over 40 years before 1870, and had planted fruit trees and erected buildings thereon, but the lower Courts had dismissed the suit without considering whether such occupation entitled the plaintiff to occupancy rights under Section 8 of the Act. It further appeared that the record of the case in the first Court was lost before the Collector heard the appeal.*

Held, that the lower Courts had committed a material irregularity in dismissing the suit without considering whether, with reference to the facts of the case and the district practice, plaintiff was not entitled to occupancy rights of a class inferior to that specifically claimed in the plaint, it being the duty of the Court, in a case such as the present, either to return the plaint for amendment or to amend it itself under Section 53, Civil Procedure Code, *proviso*, and to thereafter frame an issue which should cover the other clauses of Section 5 and Sections 6 and 8 as well.

The references are to the Nos. given to the cases in the "Record."

No.

Held, further, that the fact that the Collector had had to decide the appeal without being able to examine the record would alone have been a sufficient cause for a remand 3

C.

Civil Procedure Code.—Section 53.—Punjab Tenancy Act, 1887, Sections 5, 6, 8 —Suit for declaration of occupancy status of highest class—Duty of Court to consider whether plaintiff entitled to inferior right than that claimed—Practice.—See Occupancy Rights, No. 4.

L.

Landlord and Tenant—Punjab Tenancy Act, 1887, Sections 6, 8, 56, 60—Transfer of rights by occupancy tenant—Acquiescence on part of landlord, effect of —Facts constituting acquiescence.

Held, that when a tenant holding under Section 6 or Section 8 of the Punjab Tenancy Act, 1887, has transferred his right of occupancy without having previously obtained the consent of the landlord in writing unless the landlord sues within a reasonable time to cancel the voidable transfer, his acquiescence may be inferred, and, if proved, will disentitle him to the relief claimed, although his suit has been instituted within the period of limitation, *viz.*, within six years from the date when the right to sue accrued.

Held, further, that though "a reasonable time" must depend on the circumstances of each case, yet in cases in which the payment of rent by the alienee to the landlord or his representative is proved or may be legally presumed, he having already full knowledge of the status of the alienee, the acceptance of such rent by the landlord and his omission to sue for the cancelment of the voidable transfer constitute, in the absence of any satisfactory explanation of his conduct, acquiescence on the part in the transfer.

Held, on the facts of the present case, that the landlord had acquiesced in the transfers, and that, therefore, his suit must be dismissed 1

" " *Punjab Tenancy Act, 1887, Sections 6, 8, 51, 53, 56, 57, 60—Exchange of rights of occupancy without consent of landlord—"Transfer"—Right of landlord who has acquiesced in such transfer to subsequently sue to avoid it—Acquiescence what constitutes.—An exchange of their respective holdings by two tenants holding under Section 8 of the Punjab Tenancy Act, 1887, is a "transfer," within the meaning of Section 56 of the Act.*

When a landlord is fully aware that a tenant holding under Section 6 or Section 8 of the Act has transferred his right of occupancy without having previously obtained the consent in writing of that landlord, unless the latter sues within a reasonable time to cancel the voidable transfer, his acquiescence therein may be inferred, and, if proved, will disentitle him to the relief claimed, although his suit is instituted within six years from the date of transfer. As to what period constitutes "a reasonable time" must depend on the circumstances of each case, but in cases in which the payment of rent by the alienee to the landlord or his representative is proved or may be

The references are to the Nos. given to the cases in the "Record."

No.

legally presumed, he having already full knowledge of the *status* of the alienee, in the absence of satisfactory explanation by the landlord for his conduct, the acceptance of rent for more than one harvest without bringing a suit for the cancellation of the voidable transfer is an act which amounts to acquiescence 2

O.

Occupancy Rights.—*Punjab Tenancy Act, 1887, Sections 5, 6, 8*—*Suit for declaration of occupancy status of highest class—Duty of Court to consider whether plaintiff entitled to inferior right than that claimed—Civil Procedure Code, 1882, Section 53—Material irregularity—Collector deciding appeal in absence of record, which had been lost.*—Plaintiff's suit for a declaration of occupancy *status* under Section 5 (i) (a) of the Punjab Tenancy Act, 1887, was dismissed by the lower Courts on the ground that as he and his ancestors had always paid half *batai*, he was not entitled to the *status* claimed. It appeared, however, that plaintiff and his ancestors had held the land for over 40 years before 1870, and had planted fruit trees and erected buildings thereon, but the lower Courts had dismissed the suit without considering whether such occupation entitled the plaintiff to occupancy rights under Section 8 of the Act. It further appeared that the record of the case in the first Court was lost before the Collector heard the appeal.

Held, that the lower Courts had committed a material irregularity in dismissing the suit without considering whether, with reference to the facts of the case and the district practice, plaintiff was not entitled to occupancy rights of a class inferior to that specifically claimed in the plaint, it being the duty of the Court, in a case such as the present, either to return the plaint for amendment or to amend it itself under Section 53, Civil Procedure Code, *proviso*, and to thereafter frame an issue which should cover the other clauses of Section 5 and Sections 6 and 8 as well.

Held, further, that the fact that the Collector had had to decide the appeal without being able to examine the record would alone have been a sufficient cause for a remand 3

P.

Partition.—*Punjab Land Revenue Act, 1887, Sections 13, 112, 116, 118*—*Application for partition—Plea that holding had been already partitioned privately—Course of appeal—Question "as to property to be divided" or "as to title in the property of which partition is sought"—Entries in Settlement Records.*—Plaintiff applied to the Assistant Collector for partition of certain land recorded as jointly held by him and defendants. The latter resisted partition on the ground that the land had already been privately partitioned, though effect to such private partition had not been given in the annual papers. The Assistant Collector prepared a mode of partition for part of the land, but refused the application in regard to the balance, whereupon plaintiff appealed to the Collector for partition of the rest of the holding. The Collector returned the appeal, and directed it to be presented to the Commissioner, as the dispute concerned "the property to be divided" within the meaning of Section 118 (1) and (2) of the Punjab Land Revenue Act, 1887. The Commissioner held that the order of the Collector was wrong, and referred the question of jurisdiction to the Financial Commissioner.

The references are to the Nos. given to the cases in the "Record."

No.

Held, that the appeal lay to the Collector and not to the Commissioner, the objection that certain land had already been partitioned, though still recorded as jointly held, disputing the correctness of an entry in a record presumed to be true, and consequently raising "a question of title" within the meaning of Section 116 of the Punjab Land Revenue Act, 1887.

The principles which should guide the Courts in such cases explained 4

Punjab Land Revenue Act, 1887.—Section 13.—See Partition.

" " " " " *Section 112.—See Partition.*

" " " " " *Section 116.—See Partition.*

" " " " " *Section 118.—See Partition.*

Punjab Tenancy Act, 1887.—Section 5.—See Occupancy Rights.

" " " " " *Section 6.—See Landlord and Tenant.*
—*Occupancy Rights, No. 4.*

" " " " " *Section 8.—See Landlord and Tenant.*
—*Occupancy Rights.*

" " " " " *Section 51.—See Landlord and Tenant.*

" " " " " *Section 53.—See Landlord and Tenant.*

" " " " " *Section 56.—See Landlord and Tenant.*

" " " " " *Section 57.—See Landlord and Tenant.*

" " " " " *Section 60.—See Landlord and Tenant.*

R.

Record.—Loss of —Collector deciding appeal in the absence of the record which had been lost. —See Occupancy Rights.

Revision—Revenue Cases—Punjab Tenancy Act, 1887, Sections 5, 6, 8—Suit for declaration of occupancy status of highest class—Duty of Court to consider whether plaintiff entitled to inferior right than that claimed—Civil Procedure Code, 1882, Section 53—Material irregularity—Collector deciding appeal in absence of record which had been lost.—See Occupancy Rights.

S.

Settlement Records, entries in—See Partition.

T.

Tenant.—See Landlord and Tenant—Occupancy Right.

Transfer of Occupancy Right.—See Landlord and Tenant.

INDEX OF NAMES (REVENUE).

The references are to the Nos. given in the "Record."

												No.
B.												
Bakhsha v. Fateh Muhammad	...	...	...	...	...	...	...	...	...	...	...	2
C.												
Chinga v. Maugat Ram	...	...	...	...	...	...	...	...	...	...	...	3
J.												
Jiwan Singh v. Maharaja Jagat Singh	...	...	...	...	...	...	...	...	...	...	...	1
M.												
Malang v. Mussammat Namitti	...	...	...	...	...	...	...	...	...	...	...	4

REVENUE JUDGMENTS.

No. 1.

*Before the Hon'ble Mr. S. S. Thorburn, Officiating
Financial Commissioner.*

JIWAN SINGH,—(DEFENDANT),—PETITIONER,

Versus

MAHARAJA JAGGAT SINGH AND ANOTHER,—
(PLAINTIFFS),—RESPONDENTS.

} REVISION SIDE.

* Case No. 459 of 1896-97.

*Punjab Tenancy Act, 1887, Sections 6, 8, 56, 60—Transfer of rights by
occupancy tenant—Acquiescence on part of landlord, effect of—Facts constitut-
ing acquiescence.*

Held, that when a tenant holding under Section 6 or Section 8 of the Punjab Tenancy Act, 1887, has transferred his right of occupancy without having previously obtained the consent of that landlord in writing, unless that landlord sues within a reasonable time to cancel the voidable transfer his acquiescence may be inferred, and, if proved, will disentitle him to the relief claimed, although his suit has been instituted within the period of limitation, *viz.*, within 6 years from the date when the right to sue accrued.

Held further, that though "a reasonable time" must depend on the circumstances of each case, yet in cases in which the payment of rent by the alienee to the landlord or his representative is proved or may be legally presumed, he having already full knowledge of the *status* of the alienee, the acceptance of such rent by the landlord and his omission to sue for the cancelment of the voidable transfer constitute, in the absence of any satisfactory explanation of his conduct, acquiescence on his part in the transfer.

Held, on the facts of the present case, that the landlord had acquiesced in the transfers, and that, therefore, his suit must be dismissed.

*Petition for review of the order of the Financial Commissioner,
Lahore, dated 17th August 1897, rejecting an application for
revision of the order of Captain Dallas, Collector of Amritsar,
dated 17th June 1897.*

The application for review was accepted by the following judgment of

* Revision Case No. 460 of 1896-97 was also disposed of by the judgment in this case—*Ed., P. R.*

28th Jan'y. 1898. THE FINANCIAL COMMISSIONER.—Here are two applications for review of orders passed 17th August 1897 rejecting applications for revision in cases Nos. 459 and 460 of 1896-97. As the parties are the same, and the facts nearly identical, one order will cover both cases.

The relevant facts are as follows : —

In 1892 two brothers, one named Ghamanda Singh, the other Jhanda, both found by the first Court to be occupancy tenants, under Section 6, Punjab Tenancy Act, mortgaged with possession their respective holdings to one Jiwan Singh, in whose favor mutation was effected in July 1893. At the time the landlord's representative objected in both cases, but unsuccessfully, possession having already been delivered. He was told to seek his remedy in a regular suit. So far the two cases are alike. Here divergence occurs.

In case No. 460, in which Ghamanda Singh was alienor, the mortgagee had to sue him for possession, and decree was given in his favor immediately before mutation was effected. Further, in 1896, mortgagee put in an application "for possession and costs" against Jhanda, who had meanwhile succeeded to his brother, Ghamanda Singh's, rights on that brother's death without issue. The application was filed as the mortgagee was already in possession, cultivating through the aforesaid Jhanda as his sub-tenant. The mortgagee explains that all he wanted was costs, but that the petition-writer carelessly wrote down "possession and costs."

The plaintiff, landlord's representative, sued in October 1896 to have both the 1892 mortgages set aside, on the grounds that they had been effected "without the previous consent in writing of the landlord" (Section 56, Punjab Tenancy Act). He also sought to dispossess the mortgagee. The defence was that as at the time (1892), and again on mutation (1893), plaintiff had full knowledge of the transfers, and had afterwards without demur for more than 3 years received the lump sum rent from the mortgagee, he could not now succeed in his claim, having already by his inaction in not suing earlier, and by his action in accepting the rent harvest after harvest, acquiesced in the two otherwise voidable transfers. Further, it was alleged and admitted that the mortgagor's father, Sudda, had since 1883 repeatedly mortgaged and resumed his occupancy holding, or parts thereof, either with the oral consent of, or without objection from, the landlord's representative.

This fact was rightly held to be irrelevant to the issue by the Lower Courts. That issue was whether on the facts plaintiff had or had not acquiesced in the two transfers. The first Court's decision turned on the question of payment of rent by alienee to plaintiff. The Assistant Collector, 1st grade, wrote as follows in his judgment:—

“In regard to payment of rent the mortgagee has produced no receipt or any proof that he has been paying it. The defendant (mortgagor) first stated that the mortgagee had been paying the rent, but on a subsequent date he stated that he himself had been doing so, and that his first statement was false. His subsequent statement is supported by the receipts entered in his *khatauni*, which has been filed by him. I hold therefore that the payment of rent by the mortgagee has not been proved, and there has been no acquiescence.”

On appeal the Collector upheld the decision on the same grounds, but added one additional reason, *viz.*, that in 1896 mortgagee “does not appear to have been put in possession, for we find that in July 1896 he applied for possession, though his suit was dismissed in default.”

Application for revision was rejected, as already stated, on 17th August 1897. Application for review has now been made chiefly on the ground that in 1896-97, in other suits in which the circumstances were almost the same as in these, the village, the plaintiff and most of the facts being the same, the local courts held that acquiescence was established, and the Financial Commissioner rejected the landlord's petitions for revision. These cases will be presently referred to. Copies of judgments in these other suits being produced and a *prima facie* case for review made out, the parties were summoned and heard.

As to the question of payment of rent by alienee, as he was admittedly in possession, and as his name was regularly entered by the *Patwari* in the *Fard Bachh*, and as there is no dispute about arrears, the reasonable presumption was that alienee had been paying rent to his landlord. The onus of proving payment should not have been thrown on the alienee, but the plaintiff should have been required to prove receipt of rent from the alienor. That mortgagee could produce no receipts was natural, the taking and keeping receipts being rare. In his evidence Jhanda, mortgagor, first stated that the mortgagee in possession had been paying the rent. But thirty-three days afterwards he deposed that he had been lying, and the truth was that he and the mortgagee were in the habit of

going together to the tahsil of the State, where mortgagee handed him the rent and he passed it on to plaintiff. In support of this new story he produced a *khatauni* containing receipts in which the mortgagee's name is not mentioned. The receipts were for the kharifs of three years. It is on these receipts that stress is laid by the first Court (see passage quoted above from the judgment). I think Jhanda's tergiversation should have roused suspicions, and that receipts should have been proved. On examination I find that the receipts in the *khatauni* were written by plaintiff's *Moharrir*, one Kirpa Ram, and signed by plaintiff. The Patwari had no hand in the preparation of these receipts, and they were not proved. No inference can be drawn from the curiously late production of this suspicious *khatauni*.

As to the 1896 application by the mortgagee, on which the Collector lays stress, Jiwan Singh, mortgagee, stated his debtor, Ghamanda Singh, had died, and his heir and successor was Jhanda, so he wanted possession against Jhanda and costs in the 1893 suit. He further mentions mutation had been effected in his name on July 15th, 1893. Jhanda replied mortgagee was already in possession, that he himself was deaf, blind and a pauper, and had no concern with the land whatsoever. The application was filed in October. This does not show that mortgagee was not in possession in 1896, but the reverse. Further, Jhanda's statement goes to demonstrate that he had been bought over by the plaintiff between the date of his first deposition about rent (22nd December 1896) and his subsequent change of front (1st February 1897).

Such being the facts, do they constitute acquiescence on plaintiff's part in the voidable transfers, and, broader, what conduct on the part of a landlord is necessary for the inference of his acquiescence?

The published Rulings bearing on the latter question are as follows:—

In Civil Ruling No. 47 of 1872, quoted with approval in Civil Ruling No. 82 of 1881, it was found that $2\frac{1}{2}$ years before the suit was brought the defendants (tenants), without the express permission of the plaintiffs (owners), planted certain fruit trees which plaintiffs sued to have removed. It was held that plaintiff's delay, which was not explained, in coming forward to object to the planting of the trees, and the planting of such trees being customary in the village, were circumstances from which permission might be inferred, and accordingly plaintiffs' suit failed.

In No. 82 of 1881, where it was found that an occupancy tenant mortgaged with possession his occupancy rights, and the owner made no objection for five years until he was summoned in connection with mutation proceedings, and on account of his objection mutation was refused, whereupon the said owner a year and a quarter later sued to eject the mortgagee from the land, it was held that the owner must be taken to have acquiesced in the transfer.

In No. 161 of 1883 the Chief Court held that if, with full knowledge of the facts, a landlord intentionally acts in such a manner as to affirm the transfer, he cannot afterwards dis-affirm it.

In No. 100 of 1887, where it was found that a mortgagee had been in open possession since 1873, the Chief Court held that the conduct of the landlord had cured any original defect in the mortgage.

In No. 26 of 1889 Mr. Justice Rattigan, following Nos. 82 of 1881 and 100 of 1887, observed that, although a tenant can defeat his landlord's action, brought with intention to cancel an alienation, by proving that the landlord had subsequently ratified his tenant's act, any such plea required the clearest and most unequivocal evidence to support it. In the case under consideration the Judges found that the suit had been brought within two and a half years after the mortgage had been made, and the only act proving ratification was that the landlord had accepted rent and revenue from the mortgagee in possession for two harvests before the suit was brought. The plaintiffs explained that the mortgagee was the mortgagor's tenants' banker, and that they (the plaintiffs) had only become aware of the mortgage eight months before they brought the suit. The learned Judges held that the mere receipt of money from the mortgagee did not prove a knowledge (by the plaintiffs) of the fact of mortgage. All these rulings are under the old law (Act XXVIII of 1868); but between it and the present law (Act XVI of 1887) the only change is that the landlord's previous consent must now be "in writing." That restrictive addition in no way affects the curing effect of acquiescence.

No revenue judgments bearing on the question of what constitutes acquiescence have yet been published as rulings, but the records of the two recent cases, Nos. 450 and 478 of 1896-97, already referred to in this judgment, have been examined. The facts in these two cases are, that in one, in 1891, and

in the other, in 1888, occupancy tenants mortgaged and mutated their holdings in this village, and the landlord's representative, the present plaintiff, did not sue to cancel the mortgages and dispossess mortgagees until 1896. The evidence about the payment of rent by the mortgagees was inconclusive, but the Courts presumed that the mortgagees in possession had paid it. The landlord's acquiescence in the transfers was held to be established by his conduct.

I may here note that the period of limitation for bringing a suit to void a voidable transfer is six years from date on which cause of action arises, *i.e.*, the date on which the right to sue accrues (see Civil Ruling No. 135 of 1888). Upon consideration of all the circumstances bearing on the question of acquiescence, it appears to me that when a landlord is fully aware that a tenant holding under Section 6, or Section 8, Punjab Tenancy Act, has transferred his right of occupancy without having previously obtained the consent of that landlord in writing, unless that landlord sues within a reasonable time to cancel the voidable transfer, his acquiescence may be inferred. As to what period constitutes a "reasonable time" must depend on the circumstances of each case: in some it might be two years, in some three or more. But in cases in which the payment of rent by the alienee to the landlord or his representative for more than one harvest is proved or may be legally presumed, he having already full knowledge of the status of the alienee, I hold that, in the absence of satisfactory explanation for his conduct, his acceptance of the rent without bringing a suit for the cancelment of the voidable transfer is an act which amounts to acquiescence. Applying these general conclusions to the two cases before me, I find that under the circumstances special to them the plaintiff did not sue within a reasonable time, and, further, that there being a reasonable presumption that plaintiff did receive the rent for three years from the alienee, Jiwan Singh, before he decided to sue to cancel the two mortgages, he clearly acquiesced in these transfers and cannot succeed in his suits. For these reasons I accept the present applications, reverse the orders of the Lower Courts, and dismiss both suits. Each party will bear his own costs throughout. This order will be communicated to parties by the Collector, as having heard the parties on the 25th instant I reversed judgment and informed them that the result would be afterwards communicated to them in the above way.

Application allowed.

No. 2.

*Before the Hon'ble Mr. S. S. Thorburn, Officiating
Financial Commissioner.*

BAKHSHA,—(DEFENDANT),—PETITIONER,

Versus

FATEH MUHAMMAD,—(PLAINTIFF),—RESPONDENT.

REVISION SIDE.

Case No. 497 of 1896-97.

Punjab Tenancy Act, 1887, Sections 6, 8, 51, 53, 56, 57, 60—Exchange of rights of occupancy without consent of landlord—"Transfer"—Right of landlord who has acquiesced in such transfer to subsequently sue to avoid it—Acquiescence, what constitutes.

An exchange of their respective holdings by two tenants holding under Section 8 of the Punjab Tenancy Act, 1887, is a "transfer" within the meaning of Section 56 of the Act.

When a landlord is fully aware that a tenant, holding under Section 6 or Section 8 of the Act, has transferred his right of occupancy without having previously obtained the consent in writing of that landlord, unless the latter sues within a reasonable time to cancel the voidable transfer, his acquiescence therein may be inferred, and, if proved, will disentitle him to the relief claimed, although his suit is instituted within six years from the date of transfer. As to what period constitutes "a reasonable time" must depend on the circumstances of each case, but in cases in which the payment of rent by the alienee to the landlord or his representative is proved or may be legally presumed, he having already full knowledge of the status of the alienee, in the absence of satisfactory explanation by the landlord for his conduct, the acceptance of rent for more than one harvest without bringing a suit for the cancelment of the voidable transfer is an act which amounts to acquiescence.

Petition for revision of the order of T. H. Homan, Esquire, Collector, Dera Ismail Khan, dated 13th July 1897.

Harris, for petitioner.

Duni Chand, for respondent.

The facts of the case fully appear from the following judgment delivered by

THE FINANCIAL COMMISSIONER.—The relevant facts are as follows :— 31st Jany. 1898.

Two tenants holding under Section 8, Punjab Tenancy Act, exchanged holdings under the same landlord, possibly in 1884, but certainly in 1891, in which latter year mutation was effected. In 1896 one of the joint landlords sued, as he could do under Civil Ruling No. 65 of 1894, to cancel one of the transfers, it not having been made with his previous consent in writing, and for the ejectment of the transferee.

The first Court found that—

- (1) the exchange was a transfer within the meaning of Section 56 of the Act,
- (2) it dated not from 1884, but 1891,
- (3) it was made in a way not recognised by law, and
- (4) the defendant, transferee, had “not proved that plaintiff’s conduct was such as now to serve as an estoppel against him.”

A decree was accordingly given in plaintiff’s favor. On appeal the Collector agreed that “the exchange amounted to a sale,” but held that the plaintiff’s long silence, and the fact that he had collected “revenue” for years from the transferee, amounted to acquiescence. The Collector accordingly accepted the appeal and dismissed the suit.

On further appeal to the Commissioner (Mr. H. A. Anderson) that officer remanded the case, and pointed out that under the present law the transfer required the previous consent in writing of the landlord, hence the question was whether it occurred in 1881, in which case it was governed by the old law, or in 1891, in which case under the latter law, the clear provision of the law could not be overridden by acquiescence.

On remand the Collector found that the transfer was made in 1891, and, as enjoined, held “the exchange invalid as made without the consent in writing of plaintiff after Act XVI of 1887 had come in force.” The decision of the first Court was therefore upheld, and decree given for plaintiff.

The defendant, transferee, has applied for revision on the ground of material irregularity, in that acquiescence was proved, and under the old as well as under the new Act such acquiescence condoned the original defect in the mode in which the transfer was made. The application was admitted and the points argued by the respective counsel of parties.

The points for decision are—(1) whether an exchange is a transfer within the meaning of Section 56, Act XVI of 1887, and (2) whether with reference to that section acquiescence cures an irregular transfer, the suit being brought within period, *i.e.*, within six years from the date on which the right to sue accrues (Civil Ruling No. 135 of 1888).

On the first question plaintiff’s counsel contends that, throughout the Punjab Tenancy Act, an exchange, wherever mentioned, is referred to as if it were a right exercisable by any occupancy tenant, *e. g.*, Section 7 begins—“If the tenant has

“voluntarily exchanged the land”; and Sections 53 and 57 are referred to as confining “transfers” under Section 56 to those made “by sale, gift or mortgage” only. Thus it is argued an exchange is not a voidable transfer at all. Now, neither in the above sections nor elsewhere does the Act authorise an exchange without the landlord’s consent. All that it does is to define rights of tenants in exchanged lands. I find that an exchange is a transfer within the meaning of Section 56 of the Act.

As to the second question, it is correct that under the Civil Ruling above quoted the period of limitation for suits of this class is six years, and that the Punjab Tenancy Act declares a transfer “without the previous consent in writing “of the landlord (Section 56) shall be voidable at the instance “of the landlord” (Section 60). But the deduction that within that period a landlord can at any time, no matter what his conduct has been, void any transfer not made in conformity with Section 56 is incorrect. That under the present law (Act XVI of 1887) the words “in writing” have been added to the provision under the superseded law (Act XXVIII of 1868); requiring the landlord’s previous consent does not alter the fact that a voidable transfer can be validated by subsequent conduct on the part of the landlord showing that he has acquiesced in the transfer.

The question of what constitutes acquiescence has been considered in my judgment in case* No. 495, dated 28th January 1898. I there held that “when a landlord is fully aware “that a tenant holding under Section 6 or Section 8 of the “Punjab Tenancy Act has transferred his right of occupancy “without having previously obtained the consent of that landlord in writing, unless that landlord sues within a reasonable “time to cancel the voidable transfer, his acquiescence may be “inferred.” As to what period constitutes “a reasonable time” must depend on the circumstances of each case: in some it might be two years, in some three or more. But in cases in which the payment of rent by the alienee to the landlord or his representative is proved or may be legally presumed, he having already full knowledge of the status of the alienee, I hold that in the absence of satisfactory explanation for his conduct by the landlord, the acceptance of rent for more than one harvest without bringing a suit for the cancelment of the voidable transfer is an act which amounts to acquiescence.

* No. 1, Punjab Record, 1898, Rev. judgments—Ed. P. R.

Now in this case five years had elapsed since mutation, and during those years the plaintiff had been accepting not simply "revenue" but "rent" from the transferee, hence acquiescence is proved.

I accept the application for revision and dismiss plaintiff's suit, and decree defendant, transferee, his costs throughout.

Application allowed.

No. 3.

Before the Hon'ble Mr. S. S. Thorburn, Financial Commissioner.

CHINGA,—(PLAINTIFF),—PETITIONER,

Versus

MANGAT RAM AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

REVISION SIDE. {

Case No. 63 of 1897-98.

Punjab Tenancy Act, 1887, Sections 5, 6, 8—Suit for declaration of occupancy status of highest class—Duty of Court to consider whether plaintiff entitled to inferior right than that claimed—Civil Procedure Code, 1882, Section 53—Material irregularity—Collector deciding appeal in absence of record, which had been lost.

Plaintiff's suit for a declaration of occupancy status under Section 5 (i) (a) of the Punjab Tenancy Act, 1887, was dismissed by the lower Courts on the ground that as he and his ancestors had always paid half *batai*, he was not entitled to the status claimed. It appeared, however, that plaintiff and his ancestors had held the land for over 40 years before 1870, and had planted fruit trees and erected buildings thereon, but the lower Courts had dismissed the suit without considering whether such occupation entitled the plaintiff to occupancy rights under Section 8 of the Act. It further appeared that the record of the case in the first Court was lost before the Collector heard the appeal.

Held, that the lower Courts had committed a material irregularity in dismissing the suit without considering whether, with reference to the facts of the case and the district practice, plaintiff was not entitled to occupancy rights of a class inferior to that specifically claimed in the plaint, it being the duty of the Court, in a case such as the present, either to return the plaint for amendment or to amend it itself under Section 53, Civil Procedure Code, *proviso*, and to thereafter frame an issue which should cover the other clauses of Section 5 and Sections 6 and 8 as well.

Held, further, that the fact that the Collector had had to decide the appeal without being able to examine the record would alone have been a sufficient cause for a remand.

Petition for revision of the order of Major F. Egerton, Collector of Dhurmsala, dated 24th September 1897.

Jaishi Ram, for respondents.

The following judgment was delivered by

THE FINANCIAL COMMISSIONER.—The suit of a tenant for 31st Jany. 1898. declaration of occupancy status under Section 5 (1) (a) has been dismissed, as he had always paid half *batai* and could not therefore have the status sued for. "If it is proved," said the Collector in his order dismissing the appeal, "that the tenant and "his ancestors paid half *batai*,—and this is admitted by the "plaintiff,—this in itself is sufficient to show that the plaintiff "is not entitled to claim occupancy rights." Plaintiff applies for revision. He is an ignorant peasant; the defendants three high-placed revenue officials, also a barrister and a money-lender. Their pleader has argued the case for them. The plaintiff and his ancestors have admittedly held the land for quite 40 years before 1870, have planted fruit trees and erected buildings on the land, and it is probable, or at least possible, that such occupation entitles the tenant to occupancy rights under Section 8. It appears to me that the Courts below have committed a material irregularity in not considering whether, with reference to the facts in this case and the district practice, plaintiff is not entitled to occupancy rights of a class inferior to that specially set forth in the plaint. Though a plaintiff may not receive more than he asks for, there is no reason why he should not receive less, provided that the decree is not different in character, or inconsistent with the claim as brought. Thus when, as here, the plaintiff claimed an occupancy status of the highest class under Section 5 (1) (a), Punjab Tenancy Act, it was the duty of the Court either to return the plaint for amendment or, better, to amend it itself (see *proviso*, Section 53, Civil Procedure Code), as is the practice in Revenue Courts. Thus in this suit the issue should have been framed so as to cover the other causes under Section 5 (1) and Sections 6 and 8 as well.

I accept application and remand case for further inquiry and decision on merits with reference to above remarks.

I may add that neither Collector nor myself have had sufficient material before us for a full consideration of the facts, as the record of the case in the first Court was lost before the Collector heard the appeal. The loss may have benefited either party or neither, but looking to their respective positions, I hardly think this disappearance can have been useful for the plaintiff.

The fact that the Collector had to decide the appeal without being able to examine the record would alone have been a sufficient cause for a remand.

Application allowed : cause remanded.

No. 4.

Before the Hon'ble S. S. Thorburn, Financial Commissioner.

MALANG,—(PLAINTIFF),—PETITIONER,

REVISION SIDE.

Versus

MUSSAMMAT NAMITTI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 221 of 1897-98.

Punjab Land Revenue Act, 1887, Sections 13, 112, 116, 118—Application for partition—Plea that holding had been already partitioned privately—Course of appeal—Question “as to property to be divided” or “as to title in the property of which partition is sought”—Entries in Settlement Records.

Plaintiff applied to the Assistant Collector for partition of certain land recorded as jointly held by him and defendants. The latter resisted partition on the ground that the land had already been privately partitioned though effect to such private partition had not been given in the annual papers. The Assistant Collector prepared a mode of partition for part of the land, but refused the application in regard to the balance, whereupon plaintiff appealed to the Collector for partition of the rest of the holding. The Collector returned the appeal and directed it to be presented to the Commissioner, as the dispute concerned “the property to be divided” within the meaning of Section 118 (1) and (2) of the Punjab Land Revenue Act, 1887. The Commissioner held that the order of the Collector was wrong, and referred the question of jurisdiction to the Financial Commissioner.

Held, that the appeal lay to the Collector and not to the Commissioner, the objection that certain land had already been partitioned, though still recorded as jointly held, disputing the correctness of an entry in a record presumed to be true, and consequently raising “a question of title” within the meaning of Section 116 of the Punjab Land Revenue Act, 1887.

The principles which should guide the Courts in such cases explained. *Case referred under Section 16 (3), Punjab Land Revenue Act, 1887, by J. M. Douie, Esquire, Commissioner of Lahore.*

The following judgment was delivered by

1st July 1898.

THE FINANCIAL COMMISSIONER:—Applicant sought partition of 2,707 *kanals* 14 *marlas* recorded as jointly held by him and respondent. The latter resisted partition on the ground that the land had already been privately divided, though effect to such private partition had not been given in the annual papers.

After inquiry the Assistant Collector prepared a mode of partition for 443 *kanals* 19 *marlas*, and refused the application in regard to the balance 2,263 *kanals* 15 *marlas*. Applicant then appealed to the Collector for the partition of the rest of the holding. The Collector (Mr. Douie) returned the appeal

to the applicant and directed him to present it to the Commissioner as the dispute concerned "the property to be divided" (Section 118 (1) and (2), Land Revenue Act), in which case appeal lay to Commissioner, not to Collector.

On presentation of the appeal to him the Commissioner (Colonel Hutchinson) passed the following order:—

"The question is one of fact, *viz.*, whether certain land had formerly been divided or not. It is not a question as to what land is referred to. The application is to partition certain definite lands. The fact as to whether those lands had been divided formerly or not is not one that can be decided in this Court. I think the Collector is wrong. I therefore return the papers for the appeal to be heard in his Court. But if he thinks a reference ought to be made to Financial Commissioner I will do so."

Upon that the Collector referred the question of jurisdiction to me under Section 16 (3), Land Revenue Act, and in reporting the case gave his opinion as follows:—

"I think it would be a good thing to make such a reference. I think there is considerable doubt about the proper course of appeal in partition cases. My reasons are briefly as follows:—

"When a partition case comes up for hearing, the Revenue Officer may absolutely disallow partition (Section 115). If he does so an appeal lies to the Collector (Section 13). If he does not disallow the partition he is to determine what are the questions in dispute, distinguishing between—

- (a) "questions as to title in the property of which partition is sought," and
- (b) "questions as to the property to be divided or the mode of making the partition" (Section 116).

"Section 117 deals with the procedure in regard to the first class of questions. It will be observed that if the Revenue Officer decides these himself, his decision is treated as that of a District Judge and appeal lies to the Divisional Judge. Section 118 deals with the second class of questions referred to in Section 116, and provides that orders are appealable to the Commissioner. At first sight it would appear that the only cases in which appeal would lie to the Collector are those in which partition is refused. But suppose the Revenue Officer neglects to deal with questions of title in either of the ways laid down in Section 117, and an appeal was lodged on this account, presumably the Collector would hear it on the ground

that Section 13 must be taken as covering all cases not expressly provided for. This would also apply to an appeal on the ground that the partition was not actually carried out in accordance with "the mode of making the partition laid down by the Revenue Officer." What is wanted is some definition of the meaning to be given to the phrase "questions as to the property to be divided." The words are very wide, and cover, I think, the question raised in the present case as to whether 2,766 *kanals* or only 443 *kanals* should be *disputed*.

"It is by no means unlikely that it was intended *privately*—
Commissioner should be the appellate authority in *to title in*
many partition cases. This view derives some little support *records*.
from the fact that the only Section of the Act, as distinguished
from the rules under it (see Rule 274), which declares that
the 'Revenue Officer' engaged in a particular *practical*
shall be 'of a class not below that of Assistant Collector for part of
the 1st grade' is, so far as I am aware, Section 126, *whereupon*
to partition cases." *to holding*

As Mr. Donie was now Officiating Commissioner, he sent
on the papers to me without recording any further opinion.

My finding on the reference made is as follows:—

The objection raised was that the joint holding *by*
already been privately divided and could not be re-partitioned,
The question referred is whether such an objection is *as*
"as to the property to be divided" or "as to title *record*
property of which partition is sought" (Section 116 *with*
Revenue Act). If the former, the Commissioner would *if*
the appeal; if the latter, the Collector (Sections 13 and *maintained*
Land Revenue Act). *Act*,

I think that the distinction between the two classes
questions, though necessarily sometimes very fine, is ordinarily
clear, as the former class usually concerns one or other particular
set forth in Section 112 of the Act, and they him
directly raises an issue of title. In cases of doubt the ground
for decision should be, it seems to me, whether or not the
objection impugns the correctness of an entry affecting a share
in the Settlement or Annual Record, or to follow the words
of the old Rule 4, Part II, under Section 65 of the superannuation
Act (XXXIII of 1871) is of a kind "calling in question the
correctness of an entry in the Record-of-Rights, upon which
the shares to be assigned to the parties * * * * * must
depend."

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